90-318

No. _____

In the Supreme Court of the United States

October Term, 1990

CARL W. TINNON, LOLA TINNON, BITUMINOUS FIRE & MARINE INSURANCE COMPANY AND DELTA INCORPORATED OF ARKANSAS
Petitioners

v.

BURLINGTON NORTHERN RAILROAD COMPANY
Respondent

Petition for Writ of Certiorari to Review
Decision of United States Court of Appeals
for the 8th Circuit

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Parent company of Bituminous
Fire & Marine Insurance Company:
Old Republic Insurance Company

QUESTIONS PRESENTED FOR REVIEW

1. Whether the 8th Circuit Court of Appeals erroneously construed and applied F.R. Civ. P. Rule 51 requiring specific objections to jury instructions where opposing party violated its duty to provide petitioner with a copy of the offending jury instruction, contrary to the policy of fundamental fairness of F.R. Civ. P. Rule 1 and the import of decisions of this Court.

2. Whether the 8th Circuit Court of Appeals erroneously found the District Court did not commit error or plain error under the circumstances at trial in giving the instruction based upon A.C.A. 27-51-1302(a), the instruction providing "No person shall stop . . . a vehicle within 50 feet of the nearest rail of a railroad crossing", but omitting the statutory exception " . . . , except when necessary to avoid conflict with other traffic", when there was substantial evidence of conflict with other traffic at trial, requiring clarification of the plain error doctrine.

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No. _____

In the
Supreme Court of the United States

October Term, 1990

CARL W. TINNON, LOLA TINNON, BITUMINOUS FIRE & MARINE INSURANCE COMPANY AND STOR-ALL MANUFACTURING COMPANY
Petitioners

v.

BURLINGTON NORTHERN RAILROAD COMPANY
Respondent

Petition for Writ of Certiorari to Review
Decision of United States Court of Appeals
for the 8th Circuit

OPINIONS BELOW

The opinion of the United States Court of Appeals for the 8th Circuit filed March 23, 1990 appears at Appendix 1-6 hereto. The opinion of the United States District Court for the Eastern District of Arkansas denying Petitioners' motion for a new trial, *Tinnon v. Burlington N.R.R.*, No. J-C-86-39, Slip Op. (E.D. Ark. February 27, 1989) appears at Appendix 7-9. The Judgment of the United States District Court for the Eastern District of Arkansas dated February 7, 1989 appears at Appendix 10. The order of the United States Court of Appeals for the 8th Circuit Denying Petition for Rehearing and Suggestion for Rehearing En Banc dated May 11, 1990 appears at Appendix 11.

STATEMENT OF JURISDICTIONAL GROUNDS

The opinion of the United States Court of Appeals for the 8th Circuit for which review is sought was filed March 23, 1990. A timely petition for rehearing with suggestion for rehearing en banc was filed and denied by order of the United States Court of Appeals for the 8th Circuit dated May 11, 1990. This petition is filed within 90 days of such order of the United States Court of Appeals for the 8th Circuit denying the petition for rehearing.

28 U.S.C. 1254(1) confers jurisdiction upon this Court to review the decision of the United States Court of Appeals for the 8th Circuit upon petition for writ of certiorari.

STATUTORY PROVISIONS INVOLVED

F.R.Civ.P. Rule 1:

> "**Rule 1. Scope of Rules.** These rules govern the procedure in the United States District Courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action."

F.R.Civ.P. Rule 51:

> "**Rule 51. Instructions to Jury: Objection.** At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.:

Rules of the United States District Courts for the Eastern and Western Districts of Arkansas, Rule 3(i):

> "(i) Proposed findings of fact and conclusions of law, trial briefs and proposed jury instructions shall be submitted to the judge to whom the case is assigned, with copies served upon all other parties."

STATEMENT OF THE CASE

This case involves a petition for review of the decision of the 8th Circuit Court of Appeals affirming the decision of the U.S. District Court for the Eastern District of Arkansas in a diversity case.

On May 21, 1984, petitioner Carl Tinnon (plaintiff below), operator of a tractor trailer truck owned by petitioner Stor-All Manufacturing Co. (intervenor below), was struck by the southbound train of respondent Burlington Northern Railroad Co. (defendant below) at a crossing near the intersection of Industrial Drive and Highway 63B in Jonesboro, Arkansas (Tr. 116-117, 122), leaving Tinnon gravely and permanently impaired. Tr. 411, 413. The tracks run north and south, parallel to Highway 63B. Industrial Drive crosses the tracks and intersects Highway 63B at a 45 angle. The tracks are 61½ feet from Highway 63B at the closest point. Tr. 96-97, 100 Ap. 3.

Disinterested eyewitnesses testified at trial traffic was heavy upon intersecting Highway 63B, and that Tinnon was unable to move his truck forward and away from the tracks for two minutes or more due to a car in front of him waiting to turn left onto Highway 63B until moments before impact. Tr. 138-140, 142-143; 175-179, 185, 187; 505, 514.

At trial, the District Court gave the jury an instruction offered by respondent Burlington Northern Railroad based upon A.C.A. 27-51-1302(a), stating in pertinent part:

> "No person shall stop a vehicle within 50 feet of the nearest rail of a railroad crossing;
>
> A violation of this statute, although not necessarily negligence, is evidence to be considered by you along with all of the other facts and circumstances in the case". Ap. 27-37.

The statutory provision upon which the instruction was based, A.C.A. 27-51-1302(a) states in pertinent part, as follows:

> "No person shall stop . . . a vehicle, *except when necessary to avoid conflict with other traffic* . . . within 50 feet (50') of the nearest rail of a railroad crossing . . . " (emphasis added) Ap. 40-41.

The instruction omitted the statutory exception making the statute inapplicable in the event of "conflict with other traffic".

The trial Judge recognized this was the issue in the case, stating during the instruction conference:

> "Now, the issue in the case is, why was it stopped there. And it's your contention that there was a car to block it and it couldn't go on. And there was testimony on behalf of the railroad that there wasn't anything to impede it leaving." Ap. 18.

The District Court's pretrial order required counsel to submit proposed jury instructions to the Court ten days before trial. Ap. 12. The District Court's Rule 3(i) required copies to be served upon all other parties. Ap. 14.

Respondent railroad did not at any time provide petitioners with a copy of the instruction in question, although such was provided to the trial Court, unbeknownst to petitioners, and although the railroad did provide other instructions to petitioners. Ap. 34-36; 47-48. Nor was the statute upon which the instruction was based plead in the railroad's answer. Ap. 62-64.

Although a five-day trial had been anticipated (Tr. 21), the trial Court expedited the trial throughout and submitted the case to the jury the evening of the 3rd day of trial. Tr. 253; 398-399; 584; 644. Verdict for the railroad resulted that night. Tr. 645.

Counsel for petitioners saw the instruction for the first time when it was handed to them by the trial Court at a brief instruction conference immediately prior to the jury charge and closing arguments. Ap. 34-36. Counsel for petitioners were under the distinct impression the instruction was the Court's own instruction, since the respondent railroad had not provided them with a copy of the instruction beforehand (Ap. 34-36), and from the colloquy at the bench. Ap. 14-15; 17. The trial Judge indicated he had "looked at the statute" and " . . . that is what the statute provides . . . " Ap. 14-15. The trial Judge also indicated, "I looked at the statute . . . it just covers the flat business of stopping a vehicle within 50 feet of a railroad track, and that's what the man did here, unfortunately. I remember when that was passed. I tried to defeat it, as a matter of fact. Nathan Gordon and I worked hard to try to beat that out in the legislature." Ap. 17.

Counsel for petitioners objected to the instruction on the basis the instruction was misleading under the facts of the case and should not be given. Ap. 17. The objections were overruled, and the instruction was given. Ap. 26-27.

After the trial, counsel for petitioners learned the instruction had been offered by the respondent railroad (Ap. 34-36), and that the statutory exception contained in A.C.A. 27-51-1302(a) had been omitted from the instruction. Ap. 26-27; 37; 40-41.

Timely motion for a new trial was filed by petitioners, contending the instruction had not been provided beforehand by the railroad as required; that petitioners had not been able to review the instruction; that there was substantial evidence of conflict with other traffic at trial, rendering the instruction misleading and clearly erroneous; and that a new trial was necessary to prevent a miscarriage of justice. Ap. 34-36.

The railroad's response indicated counsel for the railroad had "intended to put the newly offered instructions on the table used by the plaintifffs" at the noon recess on the first day of trial, but "apparently this was inadvertently overlooked . . . " The railroad added it was not done intentionally and "for such oversight a sincere apology is extended . . . " Ap. 47-48. The railroad denied the instruction was erroneous, and that a new trial should be granted. Ap. 48.

The District Court denied the motion for a new trial, stating the petitioners' objection to the instruction was not specific enough to satisfy F.R.Civ.P. Rule 51. Ap. 7-9. The 8th Circuit Court of Appeals affirmed, finding the District Court did not commit plain error in giving the instruction or in denying petitioners' motion for a new trial, and further finding the jury was properly instructed. Ap. 1-6. Petitioners' timely petition for rehearing, with suggestion for rehearing en banc, was denied by the 8th Circuit. Ap. 11.

There was substantial evidence at trial petitioner Tinnon was unable to move his tractor trailer rig forward on Industrial Drive away from the railroad track due to heavy traffic upon intersecting Highway 63B, and due to a car directly in front of Tinnon waiting to turn left onto Highway 63B until moments before respondent's train hit Tinnon. Tr. 138-140, 142-143; 175-179; 185; 187.

Eyewitnesses and the investigating officer testified traffic was heavy on Highway 63B since nearby factories were getting off for lunch at that time. Tr. 124-125; 142; 178; 208; 495.

The two eyewitnesses in the best position to view the scene, Charles Pyle and James Kirkland (Tr. 136-137; 174) indicated Tinnon was stopped in place with the rear of his tractor trailer on the crossing behind a white car waiting to turn left for a period of at least two minutes or more before

the lights or signals even came on at the crossing. Tr. 138-140; 175-177; 185, 187. The signals activate 23 seconds before a train reaches the crossing. Tr. 223-224. The car pulled out onto the intersecting highway moments before impact, with Tinnon only having time to roll forward a couple of feet before impact. Tr. 143; 175-176. Eyewitness Pyle testified there was no place for the truck to go "unless he just run over the little car". Tr. 144, L.5. Another eyewitness, James Kirkland, was asked if Tinnon had time to pull out. Kirkland testified, "No sir, he couldn't have got out in the highway, there is no way he could have got out in the highway." Tr. 185.

Eyewitness Lester Harrison, a retired railroad switchman called by the railroad (Tr. 502), testified when he heard the train whistle, he noticed the truck with the rear of the trailer on the track (Tr. 504), and "When the car that was in the front (of the truck) moved out, why he (truck) pulled down some more . . . " The white car was "right in front of the truck". Tr. 505. Harrison also acknowledged on cross examination he had stated, "I know he (truck) couldn't get out until some traffic got by." Tr. 514.

Another eyewitness called by the railroad, Gary Laubach, was seated in the back of a cafe across the street from the crossing (Tr. 493) and could not see all of the intersection. Tr. 494. Although Laubach first testified he did not remember a car in front of the truck (Tr. 496), he stated on cross examination "there could have been" a car in front (Tr. 500), and from where he was sitting "it would have been hard to see the car". Tr. 501.

It was a clear day. The track was straight and level for two miles to the north. Tr. 92, 124, 216. There was nothing to obstruct the train crew's vision as they approached from the North. Tr. 124. The truck was clearly visible at the crossing from a mile away looking down the tracks from the north. Tr. 243, 247.

Respondent's train was a work train and was not on a regular schedule. Tr. 571-572. The train had an engine, a caboose and eight rock cars. Tr. 117. According to the engineer and brakeman, the train was travelling 35 m.p.h. until approximately 800 to 900 feet from the truck at the crossing, when the engineer slowed the train to 31 or 32 m.p.h. Tr. 567 The train was placed in emergency 450 to 600 feet from the truck. Tr. 556-558; 569-570. The train was 468 feet long. Tr. 256. The rear of the train stopped 50 to 75 feet beyond the point of impact at the crossing. Tr. 274.

Respondent's brakeman and engineer testified the truck never moved from the time it was first seen until the time they hit the floor of the engine approximately 50 feet away from impact. Tr. 559, 571. The brakeman testified the obstruction (truck) could be seen from a distance of at least 2,000 feet away. Tr. 563-564.

Respondents' train crew testified they did not see a car in front of the truck at the crossing (Tr. 552; 555; 567) and that they saw no traffic on Highway 63B, either. Tr. 552-570.

An acoustical expert, Tom Rimmer (Tr. 293-294), testified of sound measurements he made in the cab of the tractor involved in collision at the same place on the crossing with the truck engine running. Tr. 294-295, 299. Although the train whistle might have been theoretically audible to Tinnon for one-half to one second, it never reached the point of being an effective warning to Tinnon. Tr. 303.

Tinnon was operating a Kenworth tractor with sleeper cab pulling a 40 ft. trailer. Tr. 17; 139. Eyewitnesses Charles Pyle and James Kirkland testified of Tinnon's restricted view and poor visibility in the truck with sleeper cab having no glass in the rear of the cab.

John Bentley, train brake expert, testified the train stop distance at 32 mph was 1248.8 feet, including reaction

time. Tr. 269. Eyewitnesses Pyle (a truck driver for the Cotton Belt Railroad for eight years and son of a railroad engineer) (Tr. 144), Kirkland and Harrison (a retired switchman) (Tr. 502), did not observe any decrease in train speed or hear air from emergency brake application until at or near impact. Tr. 146-147; 180; 512-514.

The train struck the trailer in the rear, and the rear of the trailer came up in the air and pivoted "like a whip". Tr. 143. The cab hit hard. Tr. 144. Eyewitness Pyle testified Tinnon was "standing on his head" and "thrashing around" without purpose to his movement. Tr. 149. Tinnon went into "convlusions". Tr. 150. Eyewitness Laubach described Tinnon as "shaking like in a convlusion, shaking and jerking". Tr. 501.

Dr. Gary Goza, Tinnon's neurologist, testified Tinnon suffered organic brain injury in the collision, with severe memory impairment, depressive and psychotic features (Tr. 411), rendering Tinnon permanently "gravely impaired". Tr. 413.

At trial, Tinnon's past medical expenses were $69,386.00 (Tr. 373) and past lost wages were $69,070.00. Tr. 376. The present value of future medical expense was $607,941.00 (Tr. 380-381), and the present value of future lost wages was $273,795.00. Tr. 377-380. Stipulated damages to the tractor were $11,750.00. Intervenor's Ex. 1.

ARGUMENT - REASONS FOR ALLOWANCE OF WRIT

I. WHETHER THE 8TH CIRCUIT COURT OF APPEALS ERRONEOUSLY CONSTRUED AND APPLIED F.R. CIV. P. RULE 51 REQUIRING SPECIFIC OBJECTIONS TO JURY INSTRUCTIONS WHERE OPPOSING PARTY VIOLATED ITS DUTY TO PROVIDE PETITIONER WITH A COPY OF THE OFFENDING JURY INSTRUCTION, CONTRARY TO THE POLICY OF FUNDAMENTAL FAIRNESS OF F.R.CIV.P. RULE 1 AND THE IMPORT OF DECISIONS OF THIS COURT.

This case is of general and public importance in view of the strong public interest in maintaining public confidence in the fairness of our courts and system of justice. This Court's power of supervision is invoked due to the construction and application of F.R.Civ.P. Rule 51 so as to reward surprise and work injustice.

F.R.Civ.P. Rule 51 should not be applied in a vacuum and elevated to a rule of strict liability, regardless of the conduct of the opposing party creating the context in which the objection was made. The adequacy of the objection should be considered in light of the proscription of F.R.Civ.P. Rule 1, which provides the Federal Rules of Civil Procedure (including Rule 51) " . . . shall be construed to secure the just . . . determination of every action". *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); *Herbert v. Lando*, 441 U.S. 153, 178, 99 S.Ct. 1635, 1649, 60 L.Ed.2d 115 (1979). The objective of the Federal Rules of Civil Procedure is to "secure a disposition of litigation on the merits . . . and to avoid surprises and to promote justice". *2 Moore's Federal Practice*, 1.13[1] at p. 284. As this Court noted in *Surowitz v. Hilton Hotels Corporation*, 383 U.S. 363, 373, 86 S.Ct. 845, 851, 15 L.Ed.2d 807 (1966) "The basic purpose of the federal rules is to administer justice through fair trials . . . "

At trial, the Court gave the jury an instruction offered by the railroad based upon A.C.A. 27-51-1302(a) stating: "No person shall stop a vehicle within 50 feet of the nearest rail of a railroad crossing." Ap. 26-27; 37.

A critical statutory exception was omitted from the instruction based upon A.C.A. 27-51-1302(a), rendering the instruction misleading and erroneous. The omitted statutory exception, " . . . except when necessary to avoid conflict with other traffic . . . " (Ap. 40-41) was crucial to the accuracy of the charge and petitioners' case, since there was substantial evidence at trial Tinnon was stopped and unable to move away from the tracks due to conflict with other traffic. Tr. 138-140, 142-143; 175-175; 185, 187; 505, 514. The instruction provided, as a matter of law, Tinnon committed a statutory violation by being stopped within 50 feet of the nearest rail of a railroad crossing, regardless of conflict with traffic.

The instruction had been submitted to the trial Court by the respondent railroad, unbeknownst to petitioners, Tinnons and intervenors (Ap. 34-36; 47-48), in violation of the District Court's pretrial order requiring instructions to be submitted by the parties 10 days in advance of trial (Ap. 12), and U.S. District Court Rule 3(i) providing: " . . . proposed jury instructions shall be submitted to the Judge, *with copies served upon all other parties.*" Ap. 14 (emphasis added)

Since the railroad had not provided petitioners with a copy of the instruction, although it had provided petitioners with copies of other instructions (Ap. 34-36; 47-48), petitioners were under the distinct, but wrong, impression the instruction was the Court's own instruction, particularly in view of the colloquy at the bench. The Court stated:

> "I looked at the statute. It says, 'Stop, stand or park', or something like that. Of course, no person shall

> stop, that is the statute which is cited down here, A.C.A. 27-51-1302. I looked at it and that is what the statute provides: 'No one shall stop a vehicle closer than 50 feet (50') of the nearest rail of a railroad crossing'". Ap. 14-15.

The Court also recalled its own opposition to the legislation and indicated "I tried to defeat it, as a matter of fact . . . " Ap. 17. *Counsel for petitioners never suspected the railroad would have submitted an instruction to the Court without providing a copy to petitioners.* Petitioners did not discover the instruction had been offered by the railroad until after trial. Ap. 34-36. The statute upon which the instruction was based had not even been plead in the railroad's answer. Ap. 62-64.

The parties had been urged to proceed with rapidity throughout three day trial, and the trial Court had indicated its intention to submit the case to the jury that evening. Ap. 19-20; Tr. 253; 398-399; 584; 644.

At the crucial time when the instruction was seen in the instruction conference, petitioners were without benefit of the knowledge of the source of the jury instruction. Ap. 34-36. Had petitioners known the instruction had been offered by the railroad, petitioners would have requested a delay to have an opportunity to research the accuracy of the instruction. Since petitioners did not know the instruction had been authored by the railroad, petitioners were of the belief it would have been tantamount to questioning the impartial trial Court's ability to read at that point. Petitioners did not want to risk antagonizing the Court and have that sensed by the jury at that critical juncture of the trial. While one could easily say, in retrospect, that should have been done, the fact is, petitioners were without benefit of a cricual fact necessary to make a correct judgment under those circumstances, i.e. the source of the instruction, through no fault of their own. As it was, petitioners made the best objection that could reasonably be made under the

circumstances, objecting to the instruction on the basis it was misleading under the facts of the case and should not be given. Ap. 17. Petitioners groped to make a more specific objection, but did not call the precise error to the Court's attention, not having had the opportunity to review the instruction beforehand. Ap. 17; 34-36.

If the railroad had complied with the District Court's pretrial order and Rule 3(i) by providing petitioners with a copy of the instruction beforehand, petitioners would have had an opportunity to research the accuracy of the instruction and make a precise, considered objection that would have complied with the letter of Rule 51. Had the petitioners even known the instruction had been prepared by the railroad, an opportunity to research the accuracy of the instruction would have been requested and, assuming time was granted, the precise defect in the instruction would have been called to the attention of the trial Court. In fact, had petitioners known the instruction had been prepared by the railroad, petitioners would have had no reason to be concerned about antagonizing the trial Court and would not have hesitated to ask to research the instruction. However, through no fault of petitioners, petitioners did not know the instruction had been authored by the railroad.

The obvious reason for the District Court's pretrial order requiring copies of proposed instructions to be submitted to the Court in advance of the trial (Ap. 12), and District Court Rule 3(i) requiring copies of instructions submitted to the Court to be provided to opposing counsel (Ap. 14), is to provide opposing counsel with an opportunity to review the instructions and prepare considered, meaningful objections to disputed instructions. Here, petitioners were deprived of any reasonable opportunity to object to the instruction. The failure of the railroad to provide opposing counsel with a copy of the instruction virtually insured an objection would not be made which would comply with the strict letter of Rule 51.

Although petitioners accept the railroad's statement its failure to provide petitioners with a copy of the instruction was an "unintentional oversight" (Ap. 47-48), the effect upon petitioners was no less devastating. The jury was misled on a crucial point of law. Prejudice was certain.

In *Joseph v. Brierton*, 739 F.2d 1244 (7th Cir. 1984), the 7th Circuit Court of Appeals stated:

> "Rule 51 presupposes that counsel had a reasonable opportunity to object to the instructions before they were given; and where as in this case, counsel did not have such an opportunity, he is not within the bar of Rule 51."

See also *Katch v. Speidel, Div. of Textron, Inc.*, 746 F.2d 1136, 1139 (6th Cir. 1984) (Rule 51 is not always strictly enforced according to the letter of the Rule.)

Rule 51 also presupposes that opposing counsel have complied with correlative duties that have a direct bearing upon a party's ability to comply with the strict letter of Rule 51. To hold otherwise would defeat the purpose of F.R.Civ.P. Rule 1 which provides the Federal Rules of Civil Procedure "shall be construed to secure the *just* . . . determination of every action", and contravene the import of decisions of this Court.

In *Hormel v. Helvering*, 312 U.S. 552, 557, 61 S.Ct. 719, 721, 85 L.Ed. 1037 (1941), this Court stated:

> "*Rules of practice and procedure are devised to promote the ends of justice, not to defeat them.* A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. *Orderly rules of procedure do not require sacrifice of rules of fundamental justice.*" (emphasis added)

See also *Surowitz v. Hilton Hotels Corporation*, supra, stating the rules of civil procedure were " . . . written to further, not defeat the ends of justice".

The policy of judicial efficiency underlying Rule 51 should not trample underfoot the policy of fundamental judicial fairness underlying Rule 1. Such sends the wrong message to litigants, potential litigants, and the public as a whole, and serves to undermine public confidence in the courts and our system of justice. It is fundamentally unfair to hold petitioners to a lofty standard of precision while excusing respondent's violation of its fundamental duties, particularly when such brought about the petitioners' predicament. Rule 51 should not be applied in a vacuum. To do so here would work injustice and reward surprise.

An alternative ground for decision is available under *City of Newport v. Fact Concerts, Inc.*, 543 U.S. 245, 255-256, 101 S.Ct. 2748, 2753-2754, 69 L.Ed.2d 616 (1981). There, without objection, the Court gave an instruction authorizing the imposition of punitive damages against defendants. This Court found the "interest in fair and effective trial administration advanced by Rule 51" would not be served by refusal to reach the merits of the matter since the lower courts had reached and adjudicated the merits, anyway. Here, the 8th Circuit Court of Appeals, although holding petitioners' objection did not comply with Rule 51, adjudicated the merits, holding the trial Court properly instructed the jury on the applicable law. Ap. 6. Since the 8th Circuit adjudicated the merits below, the interests advanced by Rule 51 would not be served by failure to reach the merits now, particularly in light of the proscription of Rule 1.

It would certainly be contrary to Rule 1 and the clear import of the above noted decisions of this Court to allow the railroad to benefit from the situation it created, initially by offering the erroneous instruction, then by failing to provide petitioners with a copy, depriving petitioners of

any reasonable opportunity to make a meaningful objection and virtually insuring the District Court would be without the benefit of a considered and meaningful objection from petitioners. There was no "reasonable opportunity to object" presupposed by Rule 51. *Joseph v. Brierton*, supra.

II. WHETHER THE 8TH CIRCUIT COURT OF APPEALS ERRONEOUSLY FOUND THE DISTRICT COURT DID NOT COMMIT ERROR OR PLAIN ERROR UNDER THE CIRCUMSTANCES AT TRIAL IN GIVING THE INSTRUCTION BASED UPON A.C.A. 27-51-1302(a), THE INSTRUCTION PROVIDING "NO PERSON SHALL STOP . . . A VEHICLE WITHIN 50 FEET OF THE NEAREST RAIL OF A RAILROAD CROSSING", BUT OMITTING THE STATUTORY EXCEPTION " . . . , EXCEPT WHEN NECESSARY TO AVOID CONFLICT WITH OTHER TRAFFIC", WHEN THERE WAS SUBSTANTIAL EVIDENCE OF CONFLICT WITH OTHER TRAFFIC AT TRIAL, REQUIRING CLARIFICATION OF THE PLAIN ERROR DOCTRINE.

The 8th Circuit's holding the trial Judge properly instructed the jury in this case sets an unfortunate precedent in cases which fall within the purview of A.C.A. 27-51-1302 by effectively eliminating the statutory exception included by the legislature. This decision affects not only the entire state of Arkansas, but all states with similar statutes, and will create an increased hazard to the travelling public and a disincentive for railroad safety in those states.

The instruction based upon A.C.A. 27-51-1302(a) provided "no person shall stop . . . a vehicle within 50 feet of the nearest rail of a railroad crossing", but omitted the statutory exception, "except when necessary to avoid conflict with other traffic." Ap. 26-27; 37; 40-41.

The instruction in question was clearly erroneous because it effectively instructed the jury Tinnon committed

a statutory violation as a matter of law, regardless of conflict with other traffic, contrary to the law.

A finding the instruction was not erroneous would require a finding there was no substantial evidence Tinnon was unable to move forward due to conflict with other traffic. In fact, the evidence at trial established such conflict with other traffic. In the words of eyewitness Charles Pyle, there was no place for Tinnon to go "unless he just run over the little car". Tr. 144, L. 5. Eyewitness James Kirkland testified there was "no way" Tinnon had time to pull out onto the highway after the car moved moments before impact. Tr. 185. Eyewitness Lester Harrison, called by the railroad, also testified Tinnon could not "get out until some traffic got by". Tr. 514.

Respondent's work train could, and should have avoided the collision. Tinnon was helpless, being unable to move forward.

The omission of the statutory exception from the instruction *effectively nullified the heart of petitioners' case* at trial. The jury, given the erroneous instruction, probably felt the railroad had violated its duty to keep a proper lookout, but Tinnon, unfortunately, had violated the law by being stopped within 50 feet of the nearest rail of a railroad crossing. The jury was instructed traffic conditions made no difference, contrary to the law. The crucial fact question of whether Tinnon was stopped since he was unable to move forward due to conflict with other traffic was taken out of the hands of the jury by the erroneous instruction. The jury was not permitted to decide that crucial fact question. Such was devastating, particularly in a comparative negligence state where 50/50 fault results in no recovery. Ap. 27-28.

The trial Judge recognized this was the pivotal issue in this case, stating:

> "Now, the issue in this case is, why was it stopped there. And its your contention that there was a car to block it and it couldn't go on. And there was testimony on behalf of the railroad that there wasn't anything to impede it leaving." Ap. 18.

The 8th Circuit's decision is also at odds with Arkansas Supreme Court decisions considering a sister statute, A.C.A. 27-51-1303, under analagous situations. *Johnson Timber Corp. v. Sturdivant*, 295 Ark. 622, 752 S.W.2d 241, 249 (1988) (question of fact for jury whether it was practicable for motorists to have stopped their vehicles on the shoulder of the highway); *Toney v. Miller*, 269 Ark. 795, 597 S.W.2d 102 (Ark. App. 1980) (error to include instruction where evidence showed vehicle was stopped due to exigencies of traffic).

The error in the Court's instruction was not cured elsewhere in the jury charge. Ap. 23-33. As a result, a fundamental misstatement of the law was made on a crucial issue, resulting in the jury being misled as to the law applicable to this case.

Further, as applied in this case, the decision of the 8th Circuit Court of Appeals virtually eliminates the plain error doctrine in such circuit, and underscores the 8th Circuit's conflict with other circuits concerning the plain error doctrine.

The standard of review under the plain error doctrine in the 8th Circuit in the past has been often stated. In *Morris v. Getscher*, 708 F.2d 1306, 1309-1311 (8th Cir. 1983), a malpractice case, the 8th Circuit stated:

> " . . . , 'error in the instructions not properly objected to is waived unless the error is plain error in the sense that a miscarriage of justice would otherwise occur'. (cite omitted) Thus, plain error will be found in only those exceptional cases where the error has '*seriously affected the fairness*, integrity or public

> reputation of judicial proceedings'. (cite omitted)" (emphasis added)

Applying such standard, the 8th Circuit in *Morris* found both the trial Court's damage instruction and the instruction on proximate cause constituted plain error "seriously affecting the fairness of the . . . proceeding". See also *Smith v. Updegraff*, 744 F.2d 1354, 1367 (8th Cir. 1984).

Here, the failure to properly instruct the jury with respect to *all* of the applicable language of A.C.A. 27-51-1302(a), instead of just that part of the language benefitting the railroad, "seriously affected the fairness of the proceeding" and resulted in a miscarriage of justice.

However, in the instant case, the 8th Circuit appears to have retreated to a more restrictive standard, holding the ". . . mistake, if any, did not seriously affect the reasonableness, recititude, or reputation of the judicial proceedings and, therefore, . . . is not one of those rare cases requiring reversal for plain error". Ap. 11-15. As applied, this standard virtually eliminates the plain error doctrine in the 8th Circuit.

This Court has long recognized the importance to the public interest in the judiciary, on its own motion, when necessary, correcting instances of plain error in spite of the failure of counsel to make a specific objection. *N.Y. Central R.R. Co. v. Johnson*, 279 U.S. 310, 318-319, 49 S.Ct. 300, 73 L.Ed. 706 (1929) (Plain error found where opposing counsel's remarks tended to incite prejudice in spite of counsel's failure to particularize an exception.)

This Court recently stated in *City of Newport v. Fact Concerts, Inc.*, supra:

> " 'Plain error' review under Rule 51 is suited to correcting obvious instances of injustice or misapplied law."

The plain error standard applied in the 4th Circuit, as well as other circuits, is more in line with this Court's pronouncements. In *Furka v. Great Lakes Dredge and Dock Co., Inc.*, 755 F.2d 1085 (4th Cir. 1985), a death action resulting from decedent's failed attempt to rescue a fellow employee, the 4th Circuit held the failure to give a proper rescue charge to the jury constituted plain error and required reversal, despite failure of counsel to object in accordance with Rule 51, stating:

> "However, if the error is 'plain' and to ignore it would result in a denial of fundamental justice, it should be corrected. (cites omitted) '*Rules of practice and procedure are designed to promote the ends of justice, and not to defeat them . . .*' . . . In the case before us, the call to rescue and its . . . circumstances were the *soul of the appellant's case* . . . This Court has found plain error . . . where an instruction '*plainly misstated fundamentally controlling substantive principals governing . . . [the] right to recover*' (cites omitted). The trial court's failure to give a special rescue instruction here amounted to such a misstatement." (emphasis added)

Here, Tinnon's inability to move forward and away from danger due to "conflict with other traffic" was the "soul" of petitioners' case. The failure to instruct on the effect of "conflict with other traffic" resulted in a charge that "plainly misstated fundamentally controlling substantive principles governing . . . the right to recover" and should require reversal. *Furka*, supra.

See also *Miller v. Premier Corp.*, 608 F.2d 973, 983 (4th Cir. 1979) (Plain error found where instruction plainly misstated fundamentally controlling substantive principle governing right to recover); *Cruthirds v. RCI, Inc.*, 624 F.2d 632, 636 (5th Cir. 1980) (Plain error found in instructions which mislead the jury or leave the jury to speculate as to an essential point of law); *Ivey v. Wilson*, 832 F.2d 950, 955 (6th Cir. 1987) (Plain error found where error in instruction

seems obvious and prejudicial and should be corrected in the interest of justice); *Nowell by and through Nowell v. Universal Electric Co.*, 792 F.2d 1310, 1316 (5th Cir. 1986) (Plain error found where error is so fundamental as to result in miscarriage of justice); *Beardshall v. Minuteman Press Intern, Inc.*, 664 F.2d 23, 27 (Plain error found where fundamental error related to a critical issue).

This is one of those exceptional cases in which the error in the instruction has "seriously affected the fairness of the proceedings". The railroad's violation of its duty to provide petitioners with a copy of the offending instruction seriously compromised the fairness and integrity of the proceedings and makes this case one that qualifies for review under the plain error doctrine. Trial by surprise should be discouraged, not rewarded.

As Justice Black stated in *Hormel v. Helvering*, 312 U.S. 552, 557, 61 S.Ct. 719, 721, 85 L.Ed. 1037 (1941):

> "There may always be exceptional cases or particular circumstances which will prompt a reviewing . . . court, where injustice might otherwise result, to consider questions of law which are neither pressed nor passed upon by the Court . . . below".

Here, the standard of review for plain error should be revitalized to promote uniformity of decisions among the U.S. Courts of Appeals, as the doctrine is central to the search for the truth and maintaining public confidence in the courts and our system of justice. A new trial should be granted to prevent a miscarriage of justice.

CONCLUSION

Rule 51 should not be construed in a vacuum and applied to work injustice and reward surprise occasioned by the railroad's violation of its duty to provide opposing counsel with a copy of the offending instruction beforehand. Such is contrary to the policy of fundamental fairness and mandate of Rule 1, which provides the rules "shall be construed to secure the just . . . determination of every action".

The giving of the instruction in question constituted error and plain error, seriously affecting the fairness and public reputation of the proceedings, resulting in need for the supervision and review by this Court to correct the fundamental unfairness of the lower court proceedings and to prevent a miscarriage of justice.

Further, this Court should clarify and revitalize the plain error doctrine to promote uniformity of decisions among the U.S. Courts of Appeals.

Petitioners respectfully pray that their petition be granted and suggest this case may be appropriate for summary reversal.

Respectfully submitted,

CARL W. TINNON AND LOLA TINNON, Petitioners

By: /s/ Noyl Houston
Frank Lady and Noyl Houston,
Attorneys for said
Petitioners (Plaintiffs below)
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BITUMINOUS FIRE & MARINE INSURANCE CO. AND STOR-ALL MANUFACTURING CO., Petitioners

By: /s/ David Laser

By: /s/ Noyl Houston with permission
David Laser, Attorney for said
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Jonesboro, AR 72403
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APPENDIX

TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 89-1403

Carl W. Tinnon and Lola Tinnon,	*
	*
Appellants,	*
	*
v.	*
	* Appeal from the United
Burlington Northern Railroad Company,	* States District Court * for the Eastern District * of Arkansas.
Appellee,	*
	*
Bituminous Fire & Marine Ins. Co., Stor-All Manufacturing Co.,	* *
	*
Intervenors Below-Appellants.	* *

Submitted: January 17, 1990

Filed: March 23, 1990

Before BOWMAN, WOLLMAN, and BEAM, Circuit Judges.

BEAM, Circuit Judge.

Carl W. Tinnon, Lola Tinnon, Bituminous Fire & Marine Insurance Company and Stor-All Manufacturing Company (the appellants) appeal a district court[1] order

1 The case was heard before the Honorable Henry Woods, United States District Judge for the Eastern District of Arkansas.

which denied their motion for a new trial after a jury returned a verdict for Burlington Northern. The appellants asked for a new trial because they claim that a jury instruction improperly omitted reference to an exception to an Arkansas statute. The district court stated that the appellants' objection to the jury instruction was not "specific enough to preserve the issue and warrant a new trial." *Tinnon v. Burlington N. R.R.*, No. J-C-86-39, slip op. at 3 (E.D. Ark. Feb. 27, 1989). The appellants appeal on three grounds: (1) the trial court committed reversible error in giving the instruction based on the Arkansas statute; (2) the trial court committed plain error in giving the instruction; and (3) the trial court committed reversible error in denying the appellants' motion for a new trial. We affirm.

I. BACKGROUND

On May 21, 1984, a Burlington Northern train and a tractor-trailer truck collided in Jonesboro, Arkansas. The truck, driven by Carl Tinnon, was owned by Stor-All Manufacturing Company. The collision occurred on Burlington Northern trackage at a place referred to as the Industrial Drive crossing.

The Burlington Northern tracks run north and south, parallel to Highway 63-B. Industrial Drive crosses the tracks and Highway 63-B at a forty-five degree angle. On May 21, Tinnon drove the truck along Industrial Drive, crossed over the tracks, and stopped his vehicle behind a white car that was waiting to turn onto Highway 63-B. The back of Tinnon's truck remained on the tracks. Trial Transcript, vol. I, at 138. The traffic on Highway 63-B was heavy and the white car had to wait several minutes before it could turn onto the highway.

While Tinnon's truck was on the tracks, a train with one locomotive, one caboose, and eight cars carrying rock

approached the Industrial Drive crossing. The train whistle blew, the railroad crossing bells rang and the lights flashed to warn Tinnon of the approaching southbound train. *Id.* at 117, 139-40. The white car turned onto Highway 63-B and the truck rolled forward toward the stop sign protecting route 63-B. The truck-trailer unit, however, did not clear the tracks and the train hit the trailer. The rear end of the trailer flew into the air and pivoted, flipping the tractor over as it landed. *Id.* at 143. Tinnon was injured and he sued Burlington Northern. Bituminous Fire and Marine Insurance Company and Stor-All Manufacturing Company intervened as plaintiffs. Appellants' app. at 14-16.

The case was tried before a jury from January 30 to February 1, 1989. At trial, Tinnon testified that "I did not know that part of the trailer was still on the tracks. I did not hear any whistle or horn, see any lights or have any warning that a train was approaching." Trial Transcript, vol. III, at 478. The train engineer testified that he was 1200-1500 feet from the crossing when he slowed the train to 31-32 miles an hour. The engineer stated that he did not see any vehicles in front of Tinnon's truck and that he continued to blow the train whistle because he expected the truck to move. The engineer testified that at 800-900 feet from the truck, he put the train in emergency and then "hit the floor." *Id.* at 567-68. Numerous witnesses testified concerning their observations of when the white car turned onto Highway 63-B and whether Tinnon had enough time to clear the tracks before the train hit the truck.

The parties rested on February 1, 1989, and the judge held a short conference on the proposed jury instructions. The instruction at issue was offered by Burlington Northern and it was based on an Arkansas statute, A.C.A. § 27-51-1302(a) (1987). The statute provides that:

> (a) No person shall stop, stand, or park a vehicle, except when necessary to avoid conflict with other traffic or in compliance with the directions of a police

> officer or traffic-control device, in any of the following places:
>
> (9) Within fifty feet (50') of the nearest rail of a railroad crossing.

Id.

When submitting this instruction, Burlington Northern omitted the language from the statute which provided the exception dealing with the necessity "to avoid conflict with other traffic." Thus, the court instructed the jury as follows:

> Now, there was in force in the state of Arkansas at the time of the occurrence a statute which provided that no person shall stop a vehicle within 50 feet of the nearest rail of a railroad crossing.
>
> A violation of this statute, although not necessarily negligence, is evidence of negligence to be considered by you along with all of the other facts and circumstances in the case.

Trial Transcript, vol. III, at 594.

Burlington Northern apparently did not give a copy of this proposed jury instruction to the appellants when the instructions were given to the court on the first day of trial. *See* appellants' app. at 73-74. Burlington Northern did refer to Arkansas law and the requirement of stopping at railway crossings in its opening statement, but did not specifically cite this statute. Trial Transcript, vol. I, at 70-71. During the pre-trial instruction conference, the court handed both parties the proposed jury instructions. At this point, the appellants did not know that Burlington Northern had submitted the statutory instruction. Rather, the appellants believed that the jury instruction was prepared by the court. The appellants objected to the instruction on the grounds that it was not applicable to the facts and that it was misleading because Tinnon had already crossed the

tracks and was beyond them rather than approaching the tracks. The court overruled the objection. *Id.*, vol. 111, at 578-79. The jury was instructed and before the jury retired, the court asked if counsel had any further objections. Both parties said no. *Id.* at 601.

As previously indicated, the jury returned a verdict for Burlington Northern. After the trial, the appellants discovered that the instruction had been offered by Burlington Northern and that the Arkansas statute contained an exception which had been omitted. Burlington Northern responded by stating that it had intended to put the instruction on the appellants' table on the first day of the trial, but apparently this was inadvertently overlooked. Burlington Northern offered an apology for this oversight. Appellants' app. at 73-74. Burlington Northern, however, asserted that the instruction was not erroneous and argued that the motion for a new trial should be denied. The district court denied the motion on the grounds that the appellants had failed to properly object to the instruction as required by Federal Rule of Civil Procedure 51.

II. DISCUSSION

Federal Rule of Civil Procedure 51 provides:

> The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

The purpose of Rule 51 is to compel attorneys to notify the trial court when there is a defect in the jury instructions so that the court can correct the error before the case is submitted to the jury. *See Missouri Pac. R.R. v. Star City*

Gravel Co., 592 F.2d 455, 459 (8th Cir. 1979). Counsel, therefore, cannot rely on the court or another party to discharge this duty. *See Phillips v. Parke, Davis & Co.*, 869 F.2d 407, 409 (8th Cir. 1989). In this case, the appellants objected to the instruction on the ground that it was not applicable to the facts and that it was misleading, not on the ground that a portion of the Arkansas statute had been omitted from the instruction. We agree that the appellants did not distinctly state the nature of their complaint as required by Rule 51. Thus, we are limited to reviewing the instruction under the plain error standard. *See id.* We believe that the alleged mistake, if any, did not seriously affect the reasonableness, rectitude, or reputation of the judicial proceedings and, therefore, that this is not one of those rare cases requiring reversal for plain error. *See Figge Auto Co. v. Taylor*, 325 F.2d 899, 907 (8th Cir. 1964). Furthermore, even if the appellants had objected properly, under the facts of this case we find that the trial court properly instructed the jury on the applicable law and reversal would not be warranted.

III. CONCLUSION

The district court did not commit plain or reversible error in giving the instruction or in denying appellants' motion for a new trial. Accordingly, the decision of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION
(FILED: FEB. 28, 1989)

CARL W. and LOLA TINNON — PLAINTIFFS

v. — NO. J-C-86-39

BURLINGTON NORTHERN RAILROAD COMPANY — DEFENDANT

BITUMINOUS FIRE & MARINE INSURANCE COMPANY and STOR-ALL MANUFACTURING COMPANY — INTERVENORS

ORDER

The plaintiffs and intervenors have submitted the pending motion for new trial. It is their contention that the Court omitted an important part of an instruction based on *Ark. Code Ann.* 27-51-1302(a), thereby rendering the instruction misleading and "in effect nullif[ying] the heart of [their] case, . . . " *See* Brief at 3. The Court finds, however, that the plaintiffs and intervenors failed to properly object to the giving of this instruction. For this reason, their motion is denied.

The case at bar was tried before a jury beginning on January 30, 1989 and continuing through the evening of February 1, 1989. Late in the afternoon on February 1, the parties rested, and the Court began a short conference on the instructions to be given. One instruction the Court proposed to give was offered by defendant and based on *Ark. Code Ann.* 27-51-1302(a). *See* Exhibit A. The plaintiffs and intervenors objected to the giving of this instruction on the ground that it was misleading and not applicable to the facts of the case. The Court overruled the objection, and the instruction was eventually given. Following approximately

two hours of deliberation, the jury returned a verdict for defendant. It was only after the conclusion of the trial that the plaintiffs and intervenors learned that the instruction based on *Ark. Code Ann.* 27-51-1302(a) did not contain an important part of the statute. This motion followed.

Fed. R. Civ. P. 51 provides, in part:

> No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

A specific objection is necessary so that the Court may be alerted to a potential error prior to submitting the case to the jury. *See Elmore v. United States*, 843 F.2d 1128, 1133 (8th Cir. 1988). The necessity of a specific objection will be overlooked if "the failure to give an instruction [or part of an instruction] constitutes plain error." *See Id.*

In this case, the plaintiffs and intervenors objected to the instruction based on *Ark. Code Ann.* 27-51-1302(a) on the ground that it was misleading and not applicable to the facts. The Court does not believe this objection is specific enough to preserve the issue and warrant a new trial. The objection did not alert the Court to the omission of a portion of the statute; it merely challenged the propriety of giving the instruction in light of the facts. Although the Court did make a cursory examination of *Ark. Code Ann.* 27-51-1302(a) prior to giving the instruction, this examination was made solely to determine the accuracy of the instruction as offered by defendant and not to determine whether a modified instruction should be given. The Court should also note that this case does not involve plain error.

Given the foregoing then, the Court finds that the plaintiffs and intervenors failed to properly object to the

instruction as given. Their motion for new trial is therefore denied.

IT IS SO ORDERED this 27 day of February, 1989.

/s/ Henry Woods
HENRY WOODS,
U.S. District Judge

This document entered on docket sheet in compliance with Rule 58 and/or 79(a) FRCP on 2-28-89 by jt.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
(FILED: Feb. 9, 1989)

CARL W. TINNON, ET AL

BURLINGTON NORTHERN RAILROAD CO.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: J-C-86-39

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That the plaintiff(s) take nothing by his (her) (their) complaint hereof, that the action be dismissed on the merits and that the defendant recover of the plaintiff(s) their costs of action.

This document entered on docket sheet in compliance with Rule 58 and/or 79(a) FRCP on 2/9/89 by MKF.

February 7, 1989
Date

CARL R. BRENTS
Clerk

/s/ Joy Hogue
(By) Deputy Clerk Joy Hogue

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 89-1403EA

Carl W. Tinnon and Lola Tinnon,	*
	*
Appellants,	*
	*
vs.	*
	* Order Denying Petition
Burlington Northern Railroad Company,	* For Rehearing and
	* Suggestion for
	* Rehearing En Banc
Appellee,	*
	*
Bituminous Fire & Marine Ins. Co., Stor-All Manufacturing Co.,	*
	*
	*
Intervenors Below-Appellants.	*
	*

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

May 11, 1990

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
U.S. Post Office & Court House
P.O. Box 3683
Little Rock, Arkansas 72203-3683
November 28, 1988
(FILED: Nov. 28, 1988)

Henry Woods
Judge

RE: J-C-86-0039 TINNON V BURLINGTON
NOTICE TO COUNSEL: The above captioned case is RESCHEDULED for six/member jury jury trial in JONESBORO, AR., the week beginning January 30, 1989 at 9:30 A.M.

In preparation for the trial, attorneys are directed to file with the Clerk's Office, the information requested in the enclosed Pre-Trial Conference Information sheet with copies to the courtroom deputy, Ms. Joy Hogue, P.O. Box 869, Little Rock, AR 72203 and opposing counsel by no later than April 15, 1988. The failure to timely disclose the name of a witness, in the information sheet, will result in that witness not being permitted to testify absent a showing of good cause. No continuance will be granted simply because a party does not have time in which to depose a witness, expert or otherwise. Motions submitted after the deadline of the Pre-trial Information Sheet may be denied solely on the basis of having been untimely filed, and all Motions/Pleadings must be filed sufficiently in advance of that date to allow a timely response.

A complete set of instructions must be typed on separate sheets and submitted to the Court ten (10) days prior to trial. Legal authority for each instruction is to be noted at the bottom of each instruction. (e.g. AMI 501 modified)

So that the introduction of exhibits may be handled expeditiously, exhibits are to be listed on the enclosed exhibit lists in numerical sequence and submitted to the courtroom deputy thirty (30) minutes prior to trial. Exhibits are to be made available to all parties and reviewed by counsel prior to trial date. The Court directs that these lists be completed before trial date. All exhibits that can be stipulated to will be received by the Court at the beginning of trial.

In the event of settlement, please advise the Court immediately by telephoning Ms. Hogue (378-5599) in Little Rock. The case will not be removed from the calendar until an Order of Dismissal has been filed.

The Court directs that all parties shall stipulate in writing to facts not in controversy five (5) days prior to trial date.

The discovery cutoff date is April 1, 1988. ALL DISCOVERY MUST BE PROPOUNDED SO THAT ANSWERS ARE DUE BEFORE THE DISCOVERY CUTOFF DATE.

Very truly yours,

/s/ Henry Woods
HENRY WOODS

Enc.
cc:

Jack C. Deacon, P.O. Box 4057, Jonesboro, AR 72403-4057
Frank Lady, P.O. Box 1233, Jonesboro, AR 72403-1233
David N. Laser, P.O. Box 1346, Jonesboro, AR 72403-1346

RULE 3(i) OF THE UNITED STATES DISTRICT COURTS FOR THE EASTERN AND WESTERN DISTRICTS OF ARKANSAS

"Proposed findings of fact and conclusions of law, trial briefs and proposed jury instructions shall be submitted to the judge to whom the case is assigned, with copies served upon all other parties."

CONFERENCE ON JURY INSTRUCTIONS
(Open Court-Jury Absent.)

Gentlemen, would you come forward. During the recess you—well, we'll take about a five minute recess and then I'll be back and we'll go over the instructions. But if you would, come forward and get a copy of the instructions. I think they (Tr. 574) are all AMI instructions and most of them were offered by both parties. Why don't we run through them right now and then we'll—

All right. Gentlemen, because I think that you're familiar with practically all of them, most of them are stock. The first one, AMI 101, is a stock instruction; 102 is a stock instruction; 103 is a stock instruction; 104 is a stock instruction, 202—now, the next one you'll one to talk about because this is an issues instruction.

I'm going to submit the case, as I told you at the beginning, and nothing has happened to change my mind, on lookout and ordinary care in operating the train after they discovered or should have discovered that the tractor-trailer was on the track. And, incidentally, then, that's the issues. It's the AMI issues instruction.

Then the next one is the defense of Burlington, that Tinnon was negligent. The next one that these people were in the scope of their employment and that the railroad is bound by their negligence. Next is a stock definition of negligence, stock definition of ordinary care. 305 is the duty

instruction, AMI. Proximate cause, AMI. 602, every person using ordinary care; 603 the fact that an accident occurred. Now, the next one is the statute Mr. Deacon talked about. I looked at the statute. It says "stop, stand or park," or something like that. Of course, "no person shall (Tr. 575) stop," that is the statute which is cited down here, ACA 27-51-1302. I looked at it and that is what the statute provides: "No one shall stop a vehicle closer than 50 feet of the nearest rail of a railroad crossing."

Then the next one is a—let's see, now. I'm going to reverse the order. I'm going to put the lookout one first. I had them that way.

And then the next one is—because the lookout is primarily what I'm submitting it on, plus the other where they use ordinary care, and that is really a corollary lookout statute anyway.

Then the next one is a defendant's instruction, the defense, that is stopping within 50 feet. Then next is the comparative fault, and next is the instruction on damages.

What about the visible results? What are the visible results? The fact that he has trouble, face twitches or—

MR. HOUSTON: Your Honor, that's partially it, plus he has somewhat of a—he's not here—he's got somewhat of a zombie-like look to him now and that's not the case before.

THE COURT: Well, a lot of us have zombie-like looks. I know some lawyers that have zombie—I don't believe that we've got enough to justify the giving of that. That's where somebody's got a leg off or an an arm off. So I believe I'm going to cut that out.

MR. HOUSTON: Your Honor, I might add for the (Tr. 576) benefit of the record, too, that the doctors have talked about his blunt affect and that is something that—

THE COURT: Well, I don't believe that's what the cases in Arkansas mean about the way people look. A lot of people—you know, I've known lawyers that, boy, you look at them and think they might have been in accident themselves.

MR. HOUSTON: Your Honor, do we also need to change that instruction from six elements of damage, then, to five elements?

THE COURT: We do, yes. Five.

And then in the last paragraph we change it to five; the first and last. Okay. Just make those changes.

Then the next one is Mr. Laser's instruction. I include him. I see him back there. We're taking care of him.

This is a loss of consortium.

And then we talk about mortality tables. The economist talked about mortality tables. Then the next is AMI on present value. Next is a closing instruction that I use in the federal courts, and I'm going to submit it on a general verdict that: We, the jury, find for the plaintiffs and fix their damages as follows: Carl Tinnon, blank, Lola Tinnon, blank, and Stor-All, blank. These are derivative actions as far as the other people are concerned. And: We, the jury, find for the defendants.

Now, do you have any objections to any of the instructions (Tr. 577) that the Court proposes to give.

MR. DEACON: Your Honor, at the conclusion of all of the proof I would like to again renew my motion.

THE COURT: Yeah, I'll let the record show that you renewed your motion. Same result.

MR. HOUSTON: Your Honor, we would also make the same motion for the benefit of the record.

THE COURT: All right.

MR. HOUSTON: Your Honor, the plaintiffs object to the giving of the instruction pertaining to the stop, the statutory instruction that says no person shall stop a vehicle within 50 feet. The Court knows what it is. It's the plaintiff's position that this is not applicable to this situation because the plaintiff had already crossed over the tracks and was beyond it. This is an instruction that we submit should be given when a vehicle is approaching a railroad track, not beyond.

THE COURT: It doesn't say that. I looked at the statute. It didn't deal—now, I took the other one out. There's another one that Mr. Deacon had submitted and that dealt with stopping when approaching. I took that out because there is no evidence what the man did when he was approaching. That is an AMI Mr. Deacon had offered. He's probably going to object now to my failure to give it but I didn't give it because I think it's abstract and improper because there isn't (Tr. 578) one iota of evidence of what the man did approaching. He could have stopped and looked in all different directions, and maybe he did but that statute doesn't say anything. It just covers the flat business of stopping a vehicle within 50 feet of a railroad track and that's what the man did here, unfortunately.

I remember when that was passed. I tried to defeat it, as a matter of fact. Nathan Gordon and I worked hard to try to beat that out in the legislature but, unfortunately, we didn't have any success.

MR. HOUSTON: Your Honor, again, just for the record, it's our position that this is misleading. We understand the Court's ruling, but it's our position it is misleading under the facts of this case and should not be given.

THE COURT: I understand that.

Do you have any further objections? Does plaintiff have any further objections?

MR. HOUSTON: Your Honor, let me—we do need to take a moment to look at one of these.

THE COURT: Well, they're all AMI instructions, so you've looked at them for many, many times, many, many cases, I'm sure. I mean, as far as the wording is concerned. Now, you may say that one of them shouldn't be given or you want an alternate. Incidentally, on the refusing of offered (T. 579) instructions, if you want to offer any, I like them to be A, B and C because then we don't get mixed up with the numerical numbers. I don't think these are numbered but I'll probably number them before I give them. But on the refused, I like them to be A, B and C so we won't get mixed up on them. (Tr. 580)

* * *

(That portion of instruction conference dealing with three requested instructions by petitioners that were denied is deleted because they are not relevant to issues.)

THE COURT * * *

Now, the issue in the case is, why was it stopped there. And it's your contention that there was a car to block it and it couldn't go on. And there was testimony on behalf of the railroad that there wasn't anything to impede it leaving. The fact that the crossing was very dangerous or safe has nothing at all to do (Tr. 581) with the case. (Tr. 582)

* * *

(Additional irrelevant portions of instruction conference deleted.)

MR. LASER: Your Honor, if we could show for the (Tr. 583) record that the intervenor, Stor-All, joins in the objections made by Mr. Houston on behalf of the plaintiff and also in the proffered instructions made by the plaintiff.

THE COURT: All right.

All right. Mr. Deacon, do you have anything?

MR. DEACON: Your Honor, we would like to offer, and object to the Court's refusal to instruct, AMI 1804 as modified. We modified that instruction, Your Honor, keeping in mind, as you said, that this was not a situation with a (Tr. 583) vehicle approaching.

THE COURT: Well, you didn't modify it to my satisfaction. All you have to do is offer it and I'll refuse it.

MR. DEACON: I tried real hard. I was hoping you would modify a little more for me.

THE COURT: All right. Show Defendant's A refused.

MR. DEACON: And, Your Honor, we object to the Court's giving aninstruction on lookout. We think the uncontroverted evidence is that they were keeping a proper lookout under the facts and circumstances.

THE COURT: All right.

Gentlemen, how long do you want to argue this case?

MR. LADY: Your Honor, would it be possible to return in the morning and present our arguments?

THE COURT: No, I'll tell you, this is the greatest time in the world, I've found, to let a case go to the jury. This generally gets a verdict. No, we can't keep these jurors around here. We're trying to conserve money these days

and, furthermore, I've got a lot of—I've got cases stacked up down in Little Rock.

MR. HOUSTON: Your Honor, it's a complicated case. It's all pretty fresh in my mind.

THE COURT: It's a complicated case. You have all got it in hand and, I'll tell you what, you'll never be in a (Tr. 584) better position to make a closing argument than you are right now. So how much time do you want?

MR. HOUSTON: Your Honor, if we could have an hour—

THE COURT: I'll give you 45 minutes. That's plenty in this case. How do you want to divide it? You don't have to use it all and it's—the case isn't all that complicated because the issues have been narrowed down by the Court's instructions and they are just not all that complicated, and even the medical is not all that complicated when you get down to it. Anyway, I'll give you 45 minutes. I think that's—I frankly think that that might be too long, but I'll give you that.

How do you want to split it up?

MR. HOUSTON: We'd like 30 and 15, Your Honor.

THE COURT: Are both of you going to talk?

MR. LADY: He's going to argue the opening and I'll take the close.

THE COURT: And you'll close. All right.

MR. LADY: Could we have the court reporter to give us maybe a five minute warning and then a one minute warning?

THE COURT: Well, I'll give the warning but I'll give it to you that way. You want to be warned at five minutes and then one minute.

Mr. Deacon, I don't think you're going to talk 45 minutes.

MR. DEACON: No, sir. If I do, you warn me. (Tr. 585)

THE COURT: But I'll warn you at the end of 40 minutes.

All right, gentlemen. Now, I instruct first. The federal rules have been changed so it gives us an option of instructing first or last and I like to follow state practice, although I followed the other for about eight or nine years. I don't do it anymore because I think our state practice is better than that optional federal practice of instructing afterwards because the jury will have heard the instructions and they can understand them better.

MR. LASER: Judge, I only need you about 30 seconds.

MR. DEACON: And a warning at 20.

MR. LASER: And whenever you want me to do it, I'll do it.

THE COURT: What do you want, a minute?

MR. LASER: No more than that.

MR. DEACON: Your Honor, I think it should be before the defendant's argue.

MR. LASER: I'll do it right after the plaintiff's opening close—opening of their close.

THE COURT: The opening of the plaintiff's close?

MR. LASER: After the plaintiffs complete their opening part of their closing summation.

THE COURT: That's right. That's when you should. And you don't need any rebuttal? (Tr. 586)

MR. LASER: Not at all.

THE COURT: Okay. I'll give you five minues to get a drink of water.

(Reporter's Note: The following instructions were proffered by the parties, and refused by the Court:) (Tr. 587)

* * *

(The three proffered instructions by petitioners that were denied by Court are deleted because they are not relevant to issues on appeal.)

DEFENDANT'S PROFFERED INSTRUCTION A
(Tr. 588)

A railroad crossing is a place of danger. It is the duty of the driver of a motor vehicle to use ordinary care to look and listen for trains, which may require stopping his vehicle clear of the tracks in such a position to have an effective view of the tracks in both directions.

(Recess 4:50 p.m.-5:00 p.m.)

(Open Court-Jury Present)

THE COURT: I understand the jury has some questions. If it is about the case, they should be in writing but if they want to know how long they are going to stay and that sort of thing, then I can answer that for you now. If it's just something that has to do with, 'when do we eat,' or something like that, I'll answer it. All right. (Tr. 588)

At this point in the case I would appreciate your giving me your attention while I instruct you as to the law that will govern your deliberations.

It's still kind of hot in here. Do you want us to prop these doors open and see if that would help? Are you doing all right?

JUROR NO. 6: I'm all right.

THE COURT: All right.

The faithful performance of your duties as jurors is essential to the administration of justice. It is my duty as judge to inform you of the law applicable to this case by instructions. It is your duty to accept and follow them as a whole, not singling out one instruction to the exclusion of others. Now, you should not apply any rule of law with which you may be familiar unless it is included in these instructions.

It is your duty to determine the facts from the evidence produced in this trial. You are to apply the law as contained in these instructions to the facts and render your verdict upon the evidence and the law. You should not permit sympathy, prejudice or like or dislike of any party or any attorney to influence your findings or your verdict in this case.

In deciding the issues you should consider the testimony of the witnesses and the exhibits received in evidence. The (Tr. 589) introduction of evidence in court is governed by law, therefore, you should accept without question my ruling as to the introduction or the rejection of evidence, drawing no inference that by these rulings I have indicated in any way my views as to the merits of this case.

Now, opening statements, remarks during the trial and the closing arguments of the attorneys, which you are about

to hear, are not evidence but are made only to help you in understanding the evidence and the applicable law. Any argument, statement or remarks of attorneys having no basis in the evidence should be disregarded by you.

Now, I have not intended by anything that I have said or done or by any questions I may have asked or anything I've said to the attorneys to intimate or suggest what you should find to be the facts or that I believe or disbelieve any witness who has testified in this case. If anything that I have done or said has seemed to so indicate, you will disregard it.

In considering the evidence in this case you are not required to set aside your common knowledge but you have a right to consider all the evidence in the light of your own observations and experiences in the affairs of life.

You are the sole judges of the weight of the evidence and the credibility of the witnesses. In determining the credibility of any witness and the weight to be given to his (Tr. 590) or her testimony, you may take into consideration their demeanor while on the witness stand, any prejudice for or against a party, their means of acquiring knowledge concerning the matter to which they testified, any interest they may have in the outcome of the case, and the consistency or inconsistency of their testimony, as well as its reasonableness or unreasonableness.

Now, a fact in dispute may be proved by circumstantial evidence as well as by direct evidence. A fact is established by direct evidence, for example, when a witness testified as to what he or she saw, heard or experienced. A fact is established by circumstantial evidence when its existence may reasonably be inferred from other facts that have been established in the case.

Now, a party who has the burden of proof on a proposition must establish it by a preponderance of the

evidence unless the proposition is so established by other proof in the case. Now, "preponderance of the evidence" simply means the greater weight of the evidence. The greater weight of the evidence is not necessarily established by the greater number of witnesses testifying to any fact or state of facts. It is evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If upon any issue in the case evidence appears to be equally balanced or you cannot say upon which side it seems to weigh (Tr. 591) heavier, then you must resolve that question against the party who has the burden of proving it.

Now, the plaintiff and the intervenor, Stor-All, claim damages from the defendant and have the burden of proving each of three essential propositions:

First: that they have sustained damages;

Second: that defendant's train crew was negligent in failing to keep a proper lookout or failing to use ordinary care in operating the train after they discovered or should have discovered that plaintiff's tractor-trailer was stopped on the defendant's track;

Third: that such negligence in one or more of the above respects was a proximate cause of plaintiffs' and intervenor Stor-All's damages.

Now, Burlington Railroad Company contends that Carl Tinnon was guilty of negligence which was a proximate cause of his own damages.

A party who asserts the defense of negligence on the part of a person claiming damages has the burden of proving this defense.

Now, the other claims made by Mrs. Tinnon and by Stor-All, the owner of the truck, are derivative of the claim

filed by the plaintiff and are dependent upon the success of the plaintiff's claim. And I will point that out to you in the verdict forms when you arrive at that point. (Tr. 592)

At the time of the occurrence Burlington Northern Railroad Company was the employer of Harold Vaughn, engineer, Dewey Mann, brakeman, and Carl Wayne Smith, conductor. Therefore, any negligence on the part of these individuals is charged to Burlington Northern.

Now, when I use the word "negligence" in these instructions, I mean a failure to do something which a reasonably careful person would do or the doing of something which a reasonably careful person would not do under circumstances similar to those shown by the evidence in this case.

Now, a failure to use ordinary care is negligence. When I use the words "ordinary care," I mean the care a reasonably careful person would use under circumstances similar to those shown by the evidence in this case. It is for you to decide how a reasonably careful person would act under these circumstances.

It was the duty of all persons involved in this occurrence to use ordinary care for their own safety and the safety of others and the property of others.

Now, the law frequently uses the expression "proximate cause," with which you may not be familiar. When I use the expression "proximate cause," I mean a cause which in a natural and continuous sequence produces damage and without which the damage would not have occurred. (Tr. 593)

This does not mean that the law recognizes only one proximate cause of damage. To the contrary, if two or more causes work together to produce damage, then you may find that each of them was a proximate cause.

Every person using ordinary care has a right to assume, until the contrary is or reasonably should be apparent, that every other person will use ordinary care and obey the law. To act on that assumption is not negligence.

The fact that an accident occurred is not, of itself, evidence of negligence on the part of anyone.

Now, all persons operating trains upon any railroad in this state have a duty to keep a constant lookout for persons and property upon, near, or approaching the railroad track. A violation of this duty is negligence.

This does not mean that each member of the train crew must keep a constant lookout, but it does mean that an efficient lookout must be kept by some member of the crew at all times.

Now, there was in force in the state of Arkansas at the time of the occurrence a statute which provided that no person shall stop a vehicle within 50 feet of the nearest rail of a railroad crossing.

A violation of this statute, although not necessarily negligence, is evidence of negligence to be considered by you along with all of the other facts and circumstances in the case. (Tr. 594)

If you should find that the occurrence was proximately caused by negligence on the part of Burlington Northern Railroad Company and not by negligence on the part of Carl Tinnon, then Carl Tinnon, Lola Tinnon and Stor-All Manufacturing Company are entitled to cover the full amount of any damages you may find they have sustained as a result of the occurrence.

If you should find that the occurrence was proximately caused by negligence on the part of both Carl Tinnon and

the Burlington Northern Railroad Company, then you must compare the percentages of their negligence.

If the negligence of Carl Tinnon is of less degree than the negligence of Burlington Northern Railroad Company, then Carl Tinnon, Lola Tinnon and Stor-All Manufacturing Company are entitled to recover any damages which you may find they have sustained as a result of the occurrence after you have reduced them in proportion to the degree of Carl Tinnon's own negligence.

On the other hand, if Burlington Northern Railroad Company was not negligent or if the negligence of Carl Tinnon is equal to or greater in degree than the negligence of Burlington Northern Railroad Company, then Carl Tinnon, Lola Tinnon and Stor-All Manufacturing Company are not entitled to recover any damages.

If you decide for Carl Tinnon on the question of liability (Tr. 595) against the Burlington Northern Railroad Company, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following five elements of damages sustained:

A. The nature, extent and duration of any injury and whether it is temporary or permanent. In this regard you should consider the full extent of any injury sustained, even though the degree of injury is found by you to have proximately resulted from aggravation of a condition that already existed and that predisposed Carl Tinnon to injury to a greater extent then another person.

B. The reasonable expense of any necessary medical care, treatment and services received, including transportation expenses necessarily incurred in securing such care, treatment or services, and the present value of such expense reasonably certain to be required in the future.

C. Any pain and suffering and mental anguish experienced in the past and reasonably certain to be experienced in the future.

D. The value of any earnings lost.

E. The present value of any loss of ability to earn in the future.

Whether any of these five elements of damage have been proved by the evidence is for you to determine.

If you decide for Stor-All Manufacturing Company on the (Tr. 596) question of liability against Burlington Northern Railroad Company, then you must fix the amount of money which will reasonably and fairly compensate it for the difference in the fair market value of its 1976 Kenworth tractor trailer immediately before and immediately after the occurrence.

If you find for Lola Tinnon on her claim for loss of consortium against Burlington Northern Railroad Company, you should award her such damages as from the evidence would fairly compensate her for the reasonable value of any loss of the services, society, companionship and marriage relationship of her husband proximately caused by the negligence of Burlington Railroad Company.

Now, in the event you find that Carl Tinnon is entitled to damages arising in the future because of injuries or future medical expenses or future loss of earnings, you must determine the amount of his damages. If these damages are of a continuing nature, you may consider how long they will continue. If they are permanent in nature, then in computing these damages you may consider how long Carl Tinnon is likely to live.

With respect to loss of future earnings and earning capacity you may consider that some persons work all their

lives and others do not and that a person's earnings may remain the same or may increase or decrease in the future.

Mortality tables are evidence of an average life (Tr. 597) expectancy of a person who has reached a certain age, but they are not conclusive. They may be considered by you in connection with other evidence relating to the probable life expectancy of Carl Tinnon, including evidence of his occupation, health, habits and other activities, bearing in mind that some persons live longer than the average and some persons less than the average.

I have used the expression "present value" in these instructions with respect to certain elements of damage which you may find that Carl Tinnon may sustain in the future. This simply means that if you find that Carl Tinnon is entitled to recover any elements of damage which require you to determine their present value, you must take into consideration the fact that money recovered will earn interest, if invested, until the time in the future when these losses will actually occur. Therefore, you must reduce any award of such damages to compensation for the reasonable earning power of money.

Now, in the federal courts, as contrasted to state courts, your verdict must represent the considered judgment of each juror. In order to return a verdict it is necessary that each of you agree. In other words, your verdict must be unanimous.

It is your duty, as jurors, however, to consult with one another and to deliberate with a view to reaching agreement, if you can do so without violence to your individual judgment. You must each decide the case for yourself but only after an (Tr. 598) impartial consideration of the evidence in the case with your fellow jurors.

In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if

convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in this case.

Upon retiring to the jury room you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesman here in court.

Now, a verdict form has been prepared for your convenience and I'll go over this with you at this time.

There are two verdict forms. One is your verdict if you unanimously find for the plaintiff in this case, and the other is your verdict form if you find for the defendant. And they read as follows: "We, the jury, find for the plaintiff and fix their damages as follows: Carl Tinnon, blank dollars, Lola Tinnon, blank dollars, Stor-All Manufacturing, blank dollars."

And if that is your unanimous verdict, your foreperson (Tr. 599) will sign and date that verdict and return with it to the courtroom.

If your verdict is for the defendant, you will simply sign the verdict on the bottom of the page which reads: "We, the jury, find for the defendant."

Now, you will take these forms to the jury room and when you have reached unanimous agreement as to your verdict, you will have your foreperson fill in, date and sign the form which sets forth the verdict upon which you unanimously agree and then return with your verdict to the courtroom.

It is proper to add the caution that nothing said in these instructions and nothing in any form of verdict prepared for your convenience is meant to suggest or to convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is your sole and exclusive responsibility.

If it becomes necessary during any deliberations to communicate with me, you may do so by a note that you can send to me through the bailiff, signed by the foreperson or one or more members of the jury. No member of this jury should ever attempt to communicate with me by any means other than a signed writing and I will never communicate with any member of the jury on any subject touching the merits of the case. I may communicate with you about dinner or something like that, but anything regarding the case itself or the merits of the (Tr. 600) case must be in writing to me. And my communication back to you will be in writing.

Now, in a few minutes before you go out, after the closing arguments, the bailiff will take an oath and you will note that the bailiff and any other person is forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case. Bear in mind that you are never to reveal to any person, not even to me, how you stand, numerically or otherwise, on this verdict until after you have reached a unanimous verdict.

Gentlemen, are there any corrections or additions to the instructions other than previously noted by counsel?

MR. DEACON: No, sir.

MR. LADY: No, Your Honor.

THE COURT: All right. The plaintiff may go to the jury with his closing argument. And you will recall that I gave you an admonition when the attorneys made their

opening statements. The same admonition applies to the close. These arguments are not evidence but made to help you understand the evidence in the case.

All right. The plaintiff may go to the jury. (Tr. 601)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION
(FILED: Feb. 6, 1989)

CARL W. TINNON AND LOLA TINNON — PLAINTIFFS

VS. NO. J-C-86-39

BURLINGTON NORTHERN RAILROAD COMPANY — DEFENDANT

BITUMINOUS FIRE & MARINE INSURANCE COMPANY — INTERVENOR #1

STOR-ALL MANUFACTURING COMPANY — INTERVENOR #2

MOTION FOR NEW TRIAL

Come plaintiffs Carl W. Tinnon and Lola Tinnon, Intervenor #1, Bituminous Fire & Marine Insurance Company, and Intervenor #2, Stor-All Manufacturing Company, and for their motion, state:

1. That the above-styled cause was tried before a jury resulting in a defendant's verdict on February 1, 1989.

2. That plaintiffs and intervenors respectfully request a new trial upon the grounds that the following described instruction given by the Court contained a clear error of law which was timely and specifically objected to by counsel; that counsel for the plaintiffs and intervenors were under the impression the instruction was the Court's own instruction from the colloquy at the bench, including the Court's reference to having examined the statute forming the basis of the instruction and the Court's opposition to such legislation at the time of its passage by

the Arkansas Legislature; that such instruction was first seen by counsel for plaintiffs and intervenors when the Court recessed for a brief instruction conference after both parties had rested sometime after 5:00 p.m. and announced the closing arguments would be given and the case submitted to the jury that evening and then proceeded to go through the instructions. Counsel for plaintiffs and intervenors have learned since the trial that the instruction was requested by counsel for defendant, and they state they were not provided with a copy of such instruction to review beforehand in violation of the Court's pre-trial order, such being presumably by inadvertence on the part of defense counsel. The instruction was based on A.C.A. 27-51-1302(a) and a copy is attached hereto and made a part hereof as Exhibit A. The instruction states as follows:

> "There was a force in the State of Arkansas at the time of the occurrence a statute which provided:
>
> No person shall stop a vehicle within fifty feet (50') of the nearest rail of a railroad crossing;
>
> A violation of this statute, although not necessarily negligence, is evidence to be considered by you along with all of the other facts and circumstances in the case."

3. That A.C.A. 27-51-1302(a) the statutory provision upon which such instruction was based, contains a key exception which was omitted from the foregoing instruction, and such statutory provision stating as follows:

> "No person shall stop . . . a vehicle, *except when necessary to avoid conflict with other traffic* . . . , in any of the following places:
>
> (9) Within fifty feet (50') of the nearest rail of a railroad crossing; . . . "

4. That there was substantial evidence that the plaintiff's vehicle was stopped within 50 ft. of the nearest railroad crossing because of a car in front of him until moments before the collision, and that heavy traffic on the intersecting highway further prevented plaintiff's vehicle from moving away from such rail.

5. That the omission of the above noted exception to the statutory provision quoted above from the Court's instruction rendered such instruction clearly erroneous and misled the jury as to the applicable law to the prejudice of plaintiffs and intervenors.

6. That plaintiffs and intervenors should be granted a new trial pursuant to F.R.C.P. Rule 59 due to such erroneous instruction and to prevent a miscarriage of justice.

WHEREFORE, plaintiffs Carl W. Tinnon and Lola Tinnon, Intervenor #1, Bituminous Fire & Marine Company, and Intervenor #2, Stor-all Manufacturing Company respectfully pray that this Court set aside the verdict and grant a new trial; and for all other proper relief.

(BY ATTORNEYS FOR PLAINTIFFS
AND INTERVENORS)

STATE OF ARKANSAS
COUNTY OF CRAIGHEAD

VERIFICATION

We, Frank Lady, Noyl Houston, and David Laser, attorneys for plaintiffs and intervenors, respectively, verify and state on oath the statements contained in the foregoing motion are true and correct to the best of our knowledge, information and belief.

(CERTIFICATE OF SERVICE)

/s/ Frank Lady
Frank Lady, One of Plaintiffs' Attorneys

/s/ Noyl Houston
Noyl Houston, One of Plaintiffs' Attorneys

/s/ David Laser
David Laser, Attorney for Intervenors

Subscribed and affirmed to before me this 3rd day of February, 1989.

/s/ Sue Lady
Notary Public

Sue Lady, Notary Seal
Craighead County, AR
Comm. Expires 3-15-90

EXHIBIT "A"

INSTRUCTION NO. ____

There was in force in the State of Arkansas at the time of the occurrence a statute which provided:

No person shall stop [redacted] a vehicle within fifty feet (50') of the nearest rail of a railroad crossing.

A violation of this statute, although not necessarily negligence, is evidence of negligence to be considered by you along with all of the other facts and circumstances in the case.

AMI 903

A.C.A. 27-51-1302

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION
(FILED: Feb. 6, 1989)

CARL W. TINNON AND
LOLA TINNON — PLAINTIFFS

VS. NO. J-C-86-39

BURLINGTON NORTHERN RAILROAD
COMPANY — DEFENDANT

BITUMINOUS FIRE & MARINE
INSURANCE COMPANY — INTERVENOR #1

STOR-ALL MANUFACTURING
COMPANY — INTERVENOR #2

MEMORANDUM BRIEF IN SUPPORT OF MOTION FOR NEW TRIAL

At the trial of this cause there was substantial evidence that the plaintiff, Carl W. Tinnon, the operator of a tractor-trailer truck, was stopped in place with the rear of his trailer on the railroad crossing in question for a period of at least 2 minutes or more before the lights or the signals came on at the crossing, and that he was unable to move forward because of a white car in front of such truck, with such white car being unable to enter the intersecting Highway 63B to make a left turn due to heavy traffic until moments before the collision. Eye witnesses further testified that such white car pulled out onto the highway only a couple of seconds or so before impact, and that plaintiff's tractor-trailer rig then rolled forward a couple of feet before impact by the defendant's train.

2. After both parties had rested at approximately 5:00 p.m. on the third day of trial, the Court excused the

jury for a short instruction conference and indicated to the parties instructions would be given, closing arguments made, and the case submitted to the jury that evening. The Court there gave counsel for each party a packet of the instructions the Court indicated it intended to give, and proceeded to go through the instructions, at which time counsel for the plaintiffs and intervenors saw for the first time the instruction attached as Exhibit A to plaintiffs' and intervenors' motion for a new trial. The attorneys for both the plaintiffs and the intervenors were under the impression the instruction in question was the Court's own instruction from the colloquy at the bench, including the Court's reference to having looked at the statute and recalling the Court's own opposition to such legislation while a practicing attorney at the time such was enacted. It was not until plaintiff's and intervenors had completed their initial draft of this motion for a new trial that counsel for the intervenors noticed the instruction in question appeared to be typed on the same typewriter as instructions offered by the defendant, then, after making inquiry by phone, determined that such instruction had in fact been offered by the defendant, unbeknownst to plaintiffs and intervenors. While plaintiffs and intervenors presume such was inadvertent on the part of defense counsel, the failure to provide opposing counsel with a copy of such instruction in violation of the Court's pre-trial order created a situation where plaintiffs and intervenors, under the impression that it was the Court's own instruction, were not in a position to do independent research on the statute in question. Although timely and specific objections were made by the plaintiffs and intervenors to such instruction, the instruction was given and the jury was charged erroneously.

That plaintiffs and intervenors have clearly been prejudiced by the giving of such instruction because the jury was in effect instructed that A.C.A. 27-15-1302, a copy of which is attached, created an unqualified duty upon operators of vehicles to not at any time under any

circumstances stop a vehicle within 50 feet of the nearest rail of a railroad crossing, *even when necessary to avoid conflict with other traffic*, contrary to the express provisions of the law. The jury may well have felt that, while unfair, that was the law, and they had to follow it. Plaintiffs and intervenors contend the omission of such key statutory phrase from the instruction was misleading and in effect nullified the heart of the plaintiffs' and intervenors' case, which was to the effect that plaintiff had no opportunity to move before being hit by the train due to other traffic. Such critical omission was material and was clearly prejudicial. Therefore, plaintiffs and intervenors must respectfully request a new trial pursuant to F.R.C.P. Rule 59 to prevent a miscarriage of justice. See *Toney v. Miller*, 268 Ark. 795, 597 S.W.2d 102 (Ark. App. 1980) in which the Court of Appeals found the trial Court erred by giving an instruction based on another portion of the statutory provision in question, since the stop in that case was due to the exigencies of traffic, and ordered a new trial. See also *A.S. Barboro & Company v. James*, 205 Ark. 53, 168 S.W.2d 202 (1943); *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888 (4th Cir. 1980); *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280 (7th Cir. 1986) and *Monahan v. Flannery*, 755 F.2d 678 (8th Cir. 1985.)

Respectfully submitted,

By Attorneys for Plaintiffs
and Intervenors

(Certificate of Service)

27-51-1302. Stopping, standing, or parking prohibited in specified places.

(a) No person shall stop, stand, or park a vehicle, except when necessary to avoid conflict with other traffic or in compliance with the directions of a police officer or traffic-control device, in any of the following places:

(1) On a sidewalk;
(2) In front of a public or private driveway;
(3) Within an intersection;
(4) Within fifteen feet (15') of a fire hydrant;
(5) On a crosswalk;
(6) Within twenty feet (20') of a crosswalk at an intersection;

(7) Within thirty feet (30') upon the approach to any flashing beacon, stop sign, or traffic-control signal located at the side of a roadway;
(8) Between a safety zone and the adjacent curb or within thirty feet (30') of points on the curb immediately opposite the ends of a safety zone, unless the local traffic authority indicates a different length by signs or markings;
(9) Within fifty feet (50') of the nearest rail of a railroad crossing;
(10) Within twenty feet (20') of the driveway entrance to any fire station and on the side of a street opposite the entrance to any fire station within seventy-five feet (75') of the entrance when properly signposted;
(11) Alongside or opposite any street excavation or obstruction when stopping, standing, or parking would obstruct traffic;
(12) On a roadway side of any vehicle stopped or parked at the edge of a curb or street;
(13) Upon any bridge or other elevated structure upon a highway or within a highway tunnel;
(14) At any place where official signs prohibit stopping.
(b) No person shall move a vehicle not owned by the person into any such prohibited area or away from a curb a distance that is unlawful.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION
(FILED: Feb. 15, 1989)

CARL W. TINNON AND
LOLA TINNON — PLAINTIFFS

v. — NO. J-C-86-39

BURLINGTON NORTHERN RAILROAD
COMPANY — DEFENDANT

BITUMINOUS FIRE & MARINE
INSURANCE COMPANY — INTERVENOR #1

STOR-ALL MANUFACTURING CO. — INTERVENOR #2

RESPONSE TO MOTION FOR NEW TRIAL

The defendant, Burlington Northern Railroad Company, responds to the motion for new trial filed by the plaintiffs and intervenors as follows:

1. Judgment for the defendant based on the jury verdict was entered on February 9, 1989.

2. A motion for new trial was filed on February 6, 1989.

3. Jury Instruction No. 16, made the gravamen of the motion for new trial, was based on A.C.A. 27-51-1302 and was proper under the facts of the case.

4. If the jury instruction on stopping had contained language to suggest to the jury that it was permissible to stop on a railroad track "to avoid conflict with other traffic", as contended by the movants, it would have been wrong as a matter of law and would have been abstract.

5. The movants recite in their motion that the tractor trailer was stopped on the railroad track because of a car in front of him at the highway intersection. The inference that the presence of traffic in front of Tinnon gave him the right to pull onto the tracks and stop there, despite the express prohibition of the statute, is erroneous.

6. It was not necessary for Tinnon to stop on the railroad tracks "to avoid conflict with other traffic." He could have, and should have, stopped before reaching the tracks if there was traffic on the other side of the tracks which prevented him from going across and clearing the railroad tracks.

7. The prohibition of the statute about stopping within 50' of the railroad crossing does not limit the obstructing stop to a time when a train is approaching. Instead the prohibition is absolute except when necessary to avoid conflict with other traffic. Here there was no testimony that Tinnon was forced by other traffic to stop with his truck on the tracks. He had other options, both before and after he pulled upon the tracks. Thus, to include the statutory exception within the instruction would have been abstract under the evidence.

8. The preponderance of the evidence, indeed the overwhelming evidence, indicated that Tinnon, even after he pulled over the tracks, thought he was "clear" of the tracks. At a point in time prior to the immediate approach of the train, there was no car in front of him to impede him from pulling up to the intersection. In fact, the white car had pulled away for a long enough time that at least one witness thought the truck was stalled when it didn't pull forward toward Highway 63B.

9. The court told the jury that it should not single out one instruction to the exclusion of others. The court also told the jury that the stopping statute (Instruction No. 16) was only evidence of negligence to be considered by them

along with all of the other facts and circumstances in the case. Therefore, the court gave the jury the chance to evaluate the proscription of the statute in light of the facts revealed by the evidence. If it was not practical for Tinnon to comply with the statute, the jury could overlook it.

10. The key instruction applicable to the conduct of Tinnon, as revealed by the evidence, was No. 11 telling the jury that it was the duty of all persons involved in the occurrence to use ordinary care for their own safety. This required the jury to consider whether a reasonably careful person would stop on the railroad tracks under the circumstances similar to those shown by the evidence in the case. The jury, therefore, didn't need to consider a statutory prohibition to find that Tinnon was negligent in doing what he did.

11. The jury instructions, as a whole, fairly and adequately contained the law applicable to the case. They were fair to both parties. Certainly Instruction No. 16 did not affect the substantial rights of Tinnon. It seems clear that the verdict of the jury would have been the same.

12. The instruction in question was correct, the verdict of the jury was responsive to the facts and applicable law, and the motion for a new jury should be denied.

WHEREFORE, the defendant, Burlington Northern Railroad Company, prays that the motion of the plaintiffs for a new trial be denied.

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By /s/ J. C. Deacon
Attorneys for the Defendant

MEMORANDUM IN SUPPORT OF RESPONSE

State law determines the substance of jury instructions in a diversity action, but the grant or denial of jury instructions is a matter of procedure and is controlled by federal law and the Federal Rules of Civil Procedure. *Wright v. Farmers Co-Op of Arkansas & Oklahoma*, 620 F.2d 694 (8th Cir. 1980).

Even a single erroneous instruction will not necessarily require reversal on appeal if the error was cured by a subsequent instruction or by consideration of the entire charge. *Smith v. Wire Rope Corp. of America*, 383 F.2d 186 (8th Cir. 1967).

A district judge has broad discretion in the choice of the form and language of his instructions "as long as the entire charge fairly and adequately contains the law applicable to the case." *Monahan v. Flannery*, 755 F.2d 678 (8th Cir. 1985).

Even when the charge involves statutory language, the standard remains whether the instructions as a whole substantially apprise the jury of the meaning of the statute and fairly and fully present the issues to the jury. *La Barge Water Well Supply Co. v. United States*, 325 F.2d 798 (8th Cir. 1963).

If the court in the instant case had instructed the jury that an exception existed to Tinnon stopping near the rail of the crossing "when necessary to avoid conflict with other traffic", such an instruction would have been abstract under the facts of this case. Tinnon, without excusable cause, drove across the tracks and left the rear of his trailer on the tracks. He was not avoiding conflict with other traffic when he chose to drive upon the tracks. Therefore, the portion of A.C.A. 27-51-1302 inapplicable to the facts were deleted when counsel for the defendant offered the instruction. The court obviously thought the same when it slightly modified

the offered instruction and gave it. According to the remarks of the court, it was done only after a careful review of the statute to be sure that it was applicable. This is the proper manner to instruct on a statute when part of the statute would be abstract under the facts. *Hunter v. McDaniel Const. Co., Inc.*, 274 Ark. 178, 623 S.W.2d 196 (1981).

The instruction here in question was correct, in the opinion of the defendant, under the law and facts. Nonetheless, certainly the instructions when considered as a whole, in light of the facts, were fair to both parties and contained the law applicable to the case. The doctrine of harmless error expressed in Rule 61 is applicable to errors in instructions to the jury.

No error in the giving of jury instructions is a ground, under the federal rules, for granting a new trial unless the failure to take such action is inconsistent with substantial justice. The court, at every stage of the proceeding, must disregard any error or defect which does not affect the substantial rights of the parties.

Here, even prior to the start of trial on the first day, the court told counsel for all the parties that his view of the anticipated evidence indicated that Mr. Tinnon was guilty of negligence and that the primary jury question would be whether the train engineer kept a proper lookout and tried soon enough to brake the train after discovering the peril of Tinnon on the tracks. That was the thrust of the argument of counsel for the plaintiffs in both opening and closing. The jury verdict found that the train engineer responded to the peril of Tinnon as a reasonably prudent person would under the circumstances.

Aside from the merits of the motion, counsel for defendant wishes to respond to the apparent failure of counsel for the plaintiffs to receive a copy of the instruction offered by the defendant and given by the court as No. 16.

The lead attorney for the defendant had been in another trial in a distant county the week before. The instructions mailed to the court and counsel were prepared by an attorney who was not intimately familiar with the file. When the attorney of record in this case reviewed the offered instructions on Sunday night before trial, several omissions were noted. Therefore, at least four new instructions were dictated at that time. They were then typed during the morning on Monday the 30th. The new instructions included a modified AMI 1804, an instruction that the whistle complied with federal law, an instruction that the determination of need and selection of signal devides at a grade crossing is made by the State of Arkansas, and the instruction based on A.C.A. 27-51-1302. Copies were made for the court and counsel for the plaintiffs. These newly offered instructions were delivered to the Court's law clerk either at the time or after the noon recess. Counsel for the defendant intended to put the newly offered instructions on the table used by the plaintiffs since they were not in the courtroom when given to the law clerk. Apparently this was inadvertently overlooked because the attorneys say they did not receive them. Certainly it was not done intentionally. For such oversight, a sincere apology is extended to counsel for the plaintiffs and intervenors and to the court.

Despite such oversight, counsel for the defendant would point out that he mentioned in opening statement that Tinnon had stopped on the tracks in violation of the law. Certainly a jury instruction on the point was not unexpected. The court declined the defendant's offered instruction on a modified version of AMI 1804 which would have told the jury that a railroad crossing was a place of danger and that a motorist should stop his vehicle clear of the tracks. That was really the instruction the defendant would have preferred. It seemed to state the law in a more direct manner than the statutory prohibition which was given.

In any event, the charge as a whole was fair, the jury verdict was responsive to the law and facts, and the court should deny the motion for new trial.

Respectfully submitted,

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(CERTIFICATE OF SERVICE)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION
(FILED: Feb. 21, 1989)

CARL W. TINNON AND
LOLA TINNON — PLAINTIFFS

VS. NO. J-C-86-39

BURLINGTON NORTHERN RAILROAD
COMPANY — DEFENDANT

BITUMINOUS FIRE & MARINE
INSURANCE COMPANY — INTERVENOR #1

STOR-ALL MANUFACTURING CO. — INTERVENOR #2

PLAINTIFFS' AND INTERVENORS' REPLY TO DEFENDANT'S RESPONSE TO MOTION FOR A NEW TRIAL

Come plaintiffs, Carl W. Tinnon and Lola Tinnon, and intervenors, Bituminous Fire & Marine Insurance Company and Stor-All Manufacturing Co., and for their reply to the response of defendant Burlington Northern Railroad Company to plaintiffs and intervenors' motion for a new trial, state:

1. Plaintiffs and intervenors admit judgment for the defendant based on jury verdict was entered on February 9, 1989.

2. Plaintiffs and intervenors admit their motion for new trial was filed on February 6, 1989.

3. Plaintiffs and intervenors deny the jury instruction based on A.C.A. 27-51-1302 was proper under the facts of this case. Plaintiffs and intervenors state in the affirmative

such instruction stated some of the statutory language from A.C.A. 27-51-1302 as follows:

> "No person shall stop a vehicle within fifty feet (50 feet) of the nearest rail of a railroad crossing."

but omitted the statutory language:

> " . . . , except when necessary to avoid conflict with other traffic . . . ",

and that such material omission made such instruction erroneous under the facts of this case and misleading as to the law.

4. Plaintiffs and intervenors deny the inclusion of the statutory exception noted above would have made such instruction wrong and abstract. Plaintiffs and intervenors state in the affirmative there was substantial evidence, in fact the clear weight of the evidence, at trial that plaintiff Carl Tinnon could not move his truck forward due to a car directly in front of him, which car could not turn left due to heavy traffic on the intersecting Highway 63B, therefore it would not be erroneous or abstract to include such statutory exception. It was error to omit such exception.

5. Plaintiffs and intervenors deny defendant has accurately characterized their position or the statutory provision in question. The statute does not make an express prohibition against stopping within 50 feet of the tracks as urged by defendant. The statutory prohibition is qualified by an exception which renders the statutory prohibition inapplicable. Plaintiffs and intervenors state in the affirmative the clear weight of the evidence at trial was the plaintiff Carl Tinnon had pulled all but the rear of his trailer across the tracks at least two minutes prior to the bells and lights becoming activated at the crossing (which are set to activate when the train is 23 seconds away from the crossing at maximum authorized speed), and that said

plaintiff was unable to move forward from that point due to a car in front of him which could not make a left turn due to heavy traffic on Highway 63B. Plaintiffs and intervenors further state in the affirmative it should have been found as a matter of law plaintiff Carl Tinnon stopped his vehicle to avoid conflict with the traffic in front of him and hence the instruction should have not been given at all, or at the very least, it should have been a fact question for the jury as to whether plaintiff Carl Tinnon stopped his vehicle to avoid conflict with the traffic in front of him, and the statutory exception should have been included in the instruction so the jury would be correctly charged as to the law applicable to the facts.

6. Plaintiffs and intervenors deny defendant's allegation it was not necessary for Tinnon to stop on the railroad tracks to avoid conflict with other traffic and that he should have stopped before reaching the tracks. Plaintiffs and intervenors state in the affirmative the evidence at trial was that Tinnon moved to the point where he was immediately before being struck long before there was any indication of the approach of a train. It would be absurd and unreasonable for Tinnon to have stopped 50 feet from the tracks and not proceed on when no train was in sight. Defendant would have the question of the reasonableness of the plaintiff's conduct taken from the jury and the jury instructed, as it was by the instruction in question, that Tinnon was in violation of A.C.A. 27-51-1302 as a matter of law, which is contrary to the statutory exception for the exigencies of traffic, which clearly was applicable here.

7. Defendant argues "there was no testimony that Tinnon was forced by the traffic to stop with his truck on the tracks" and that Tinnon "had other options", therefore the inclusion of the statutory exception would have made the instruction "abstract." Plaintiffs and intervenors state in the affirmative there was overwhelming evidence that Tinnon was unable to move forward due to traffic in front of

him and that there was "nothing he could do." Again, defendant would like to take from the jury the question of the reasonableness of the plaintiff's conduct in moving up in traffic long before there was any indication of the approach of defendant's train and have the jury instructed, as it was, that the law created an unqualified prohibition against stopping on the tracks under any circumstances, regardless of traffic conditions. Such is not the law.

8. Plaintiffs and intervenors deny defendant has accurately characterized the evidence at trial. The testimony of eye witnesses Charles Pyle, James Kirkland, and Lester Harrison, who incidentally was a retired railroad switchman called as one of defendant's witnesses, was that a car was in front of plaintiff's truck until moments before impact by the train, and when the car moved, plaintiff Tinnon only had time to move forward some 2-3 feet before impact. The only witness that testified the truck appeared stalled conceded on cross examination she had indicated the car moved "right before" the train hit the truck. Plaintiffs and intervenors state in the affirmative it is irrelevant whether Tinnon "thought he was clear of the tracks" because he could not move forward. Again, the jury should not have been instructed, as it was, that plaintiff was in violation of a statutory prohibition as a matter of law. The statutory provision was either inapplicable as a matter of law due to the traffic conditions, or at the least, a fact question was created for the jury and the jury should have been properly charged as to the law.

9. Plaintiffs and intervenors deny the giving of the erroneous instruction was innocuous as urged by defendant. While the instruction did instruct the jury that stopping within 50 feet of the nearest rail railroad crossing was *evidence* of negligence, the instruction also erroneously instructed the jury there *was a violation* of the statutory prohibition against stopping within 50 feet of the nearest rail as a matter of law, without qualification or exception, which is not true. Either the instruction should not have

been given at all due to the traffic conditions existing, or if given, the jury should have been correctly charged that there was no violation of the statutory prohibition against stopping within 50 feet of the nearest rail when necessary to avoid conflict with traffic. In other words, it should at least have been a fact question for the jury as to whether there was a violation of the statutory prohibition, as opposed to the jury being instructed as a matter of law there was a statutory violation, regardless of traffic conditions. The jury should not have had to "overlook" the statute, the jury should have been correctly charged as to the language of the statute and not misled as to the law.

10. Plaintiffs and intervenors deny instruction #11 providing all persons involved in the occurrence have the duty to use ordinary care for their own safety excuses the defendant's misstatement of the law in the instruction in question. Plaintiffs and intervenors admit the jury didn't need to consider a statutory prohibition to find Tinnon was negligent, if the jury was so inclined. Plaintiffs and intervenors state in the affirmative that is one reason why the instruction in question should not have been given at all under the facts of this case since it was unnecessary.

11. Plaintiffs and intervenors deny the jury instructions as a whole fairly and adequately contain the law applicable to the case and further deny the instruction in question did not affect the substantial rights of Tinnon. Plaintiffs and intervenors further state it is sheer speculation to state the jury verdict would have been the same. The giving of the instruction in question did, in fact, materially and substantially affect the right of Tinnon to have the jury correctly charged as to the law, and the erroneous instruction likely played a significant part in the decision of the jury.

12. Plaintiffs and intervenors deny the instruction was correct and that the verdict was proper. Plaintiffs and

intervenors state in the affirmative the motion for new trial should be granted to prevent a miscarriage of justice due to the nature of the instruction given, which misled the jury as to the law applicable to the facts.

WHEREFORE, plaintiffs and intervenors respectfully pray that their motion for a new trial be granted; and for all other proper relief.

(BY ATTORNEYS FOR PLAINTIFFS AND INTERVENORS)

MEMORANDUM BRIEF IN SUPPORT OF PLAINTIFFS' AND INTERVENORS' REPLY TO DEFENDANT'S RESPONSE TO MOTION FOR A NEW TRIAL

At the outset it should be observed that defendant's failure to provide plaintiffs and intervenors counsel with a copy of the instruction in question, while apparently inadvertent, resulted in the jury being erroneously charged and misled as to the law applicable to the evidence at trial.

On or about January 25, 1989, plaintiffs' attorneys received a cover letter dated January 24, 1989 from Mr. Deacon, one of defendant's attorneys, with AMI instructions 101, 102, 103, 104, 202, 203, 206, 301, 303, 305B, 501 and 602, and a requested instruction allegedly based on the manual of Uniform Traffic Control Devices on Streets and Highways and 23 C.F.R. Sec. 655.601, as well as A.C.A. Sec. 27-52-104, all of which were attached to the cover letter. No other instructions were provided by defendant at such time. On Saturday afternoon of January 28, 1989, plaintiffs and intervenors met at the home of Mr. Deacon for the purpose of reviewing exhibits, at which time defendant's attorney gave plaintiffs' attorneys two additional requested instructions, AMI 603 and 1804. No other instructions were ever provided attorneys for plaintiffs or intervenors.

The failure to provide counsel for plaintiffs and intervenors with a copy of the instruction before hand, as required, resulted in the jury being erroneously charged as to the applicable law. Plaintiffs and intervenors take exception to the argument that the Court would have given the instruction in question, in the form it was given to the jury, anyway, regardless of whether they had been permitted to review the instruction beforehand and do independent research thereon. Plaintiffs and intervenors sincerely doubt such would have occurred.

If the jury was charged as to the rule of A.C.A. 27-51-1302 at all, the jury should also have been made aware of the exception to the rule, and have had the opportunity to determine if the rule applied or not. As it was, the jury was simply instructed stopping within 50 feet of the nearest rail was a violation of an Arkansas law. The jury, had it been apprised of the statutory exception, might well have found there was no violation of the statute under the facts of this case.

Defendant argues a single erroneous instruction will not necessarily require reversal on appeal, if the error was cured by subsequent instruction or by consideration of the entire chart. While that is a correct statement of the law, here the error was *not* cured by a subsequent instruction or by consideration of the entire chart. No. instruction indicated anywhere that it was *not* a violation of statute to stop a vehicle within 50 feet of the nearest rail of a railroad crossing when necessary to avoid conflict with traffic. Under the facts of this case, such was a crucial omission and, in effect, nullified the heart of the plaintiffs' and intervenors' case. Omitting the statutory exception from the instruction in question in effect instructed the jury the traffic conditions were irrelevant and that a violation of law occurred, contrary to the express provisions of A.C.A. 27-51-1502. Nowhere is this error cured in the instructions given.

In *Monahan v. Flannery*, 755 F.2d 678 (8th Cir. 1985) the 8th Circuit considered a somewhat similar situation in which a highway worker had been killed while "flipping signs" in the course of her duties as a highway worker. Certain state statutes excepting highway workers from the provisions of the otherwise applicable rules of the road were in effect at the time. Despite the statutory exception, the District Court instructed the jury the decedent could be found negligent if in violation of the statutory rules of the road. After stating the general principles noted in defendant's brief to the effect the instructions as a whole must be considered, the Court stated at page 681 as follows:

> "As we apply these principles to the case before us, we first observe that Section 39-606 plainly and unequivocally excepts persons "engaged in work upon the surface of a highway" from the particular provisions of the several statutes that comprise the rules of the road. Despite this statutory exception, the District Court proceeded to instruct that Monahan could be found negligent if she did not yield the right of way or if she crossed in front of the path of the vehicle involved in the accident. These prohibitions are contained in the statutory rules of the road, *which are expressly made inapplicable* to persons working on a highway. *The instructions taken in their entirely are thus contrary to the provisions of Section 39-606.* The Monahans were entitled to have an instruction that the right of way and crossing duties did not apply to highway workers. Instead, the instructions specifically place these duties on Ms. Monahan." (emphasis added)

The Court of Appeals went on to note that Flannery's attempts to avoid the impact of the omitted exception were untenable. Flannery had argued that Monahan's work of "flipping signs" was not work on the "surface of the road." The Court went on to state the construction urged by Flannery was unreasonable and noted at page 682.

> "Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible."

The 8th Circuit went on to find the District Court committed reversible error in instructing the jury on specific allegations of contributory negligence that were made inapplicable by the statutory exception for highway workers. Here, a similar situation is presented by the failure to apprise the jury of the statutory exception found in A.C.A. 27-15-1302 for the exigencies of traffic, and the unreasonable construction urged upon the statute by defendant should be disregarded, as was the case in Monahan, supra.

Defendant argues Tinnon was not avoiding conflict with other traffic when he "chose to drive upon the tracks." However, Tinnon was avoiding conflict with other traffic when he was unable to move forward due to a car in front of him in heavy traffic on Highway 63B. When Tinnon drove across the tracks, there was no train in sight and it was uncontradicted that he was in place at least two minutes or more before the bells and the signals came on at the crossing, which come on 23 seconds before the train enters the crossing. It was not unreasonable for Tinnon to believe there was no danger in him moving up in traffic since there was no indication of the approach of a train. In fact, the ordinary and reasonable person would have felt it unreasonable for Tinnon *not* to have moved forward under the conditions then and there existing. The disinterested eye witness testimony clearly established the presence of a small car in front of plaintiff Tinnon which blocked his ability to move forward until the car moved a moment or two before impact, with plaintiff Tinnon only having time to roll forward a couple of feet prior to impact. The small car had not been able to make a lefthand turn onto Highway 63B due to heavy traffic conditions existing at the time. Even Lester Harrison and Marsue Winningham, defendant's own witnesses, testified as to the heavy traffic

conditions existing, in addition to the other disinterested eye witnesses. Under such facts, the instruction in question probably should not have been given at all.

In *A.S. Barboro & Company v. James*, 205 Ark. 53, 168 S.W.2d 202 (1943) the Arkansas Supreme Court found an instruction based on Section 6747 of Pope's Digest, a sister statute to A.C.A. 27-51-1302, the statute in question, to have been erroneously given because the vehicle had stopped on the highway to make a lefthand turn. The Court stated at page 206 of 168 S.W.2d as follows:

> "The instruction should not have been given. The non-parking statute had no place in this case because there was no such stopping or parking as was contemplated within the non-parking statute . . . as was said by this Court in the case of *Cohen v. Ramey*, 201 Ark. 713, 147 S.W.2d 338, 341 'the shorter temporary stop that Flora Ramey made to allow two cars close to her to pass did not in any sense amount to a parking or stopping on the roadside . . . ' The driver of the Barboro truck was not parking his car and for the trial Court to instruct the jury on the parking statute to allow the jury to draw the conclusion that there was a fact question as to whether or not the Barboro truck was violating that statute."

The Arkansas Court held the stop made by the Barboro vehicle was not the sort of stop contemplated by the non-parking statute and therefore the instruction should not have been given at all.

In the more recent case of *Toney v. Miller*, 268 Ark. 795, 597 S.W.2d 102 (Ct. App. 1980), the Arkansas Court of Appeals considered an instruction based upon the same sister statute and stated at page 105 of 597 S.W.2d as follows:

> "Since the undisputed evidence shows the appellee had not parked her motor vehicle upon the travel portion of the highway, but shows she momentarily stopped because of the exigencies of traffic, we conclude it was prejudicial error for the Court over the objections of the appellee, to include the statute and the instructions. (cite omitted)"

The Court went on to vacate the judgment and order a new trial. Here, plaintiff Tinnon had not walked off and left his truck stopped on the tracks. He had not abandoned his vehicle. It is highly questionable that he even "stopped" his vehicle within the meaning of A.C.A. 27-51-1302 forming the basis of the instruction in question. He had merely moved up in traffic and was unable to move forward due to traffic in front of him.

It is interesting to note that both Section 6747 of Pope's Digest (now A.C.A. 27-51-1303) and A.C.A. 27-51-1302 concern "stopping, standing or parking" vehicles under certain circumstances. Both statutes were originally enacted as Sections 92 and 90 of Act #300 of the 1937 Arkansas General Assembly, hence cases interpreting one are directly analagous to interpretation of the other statutory provision.

Here, if the instruction in question based on A.C.A. 27-51-1302 was given at all, the jury should have been permitted to find, or not find, Tinnon was stopped where he was due to the need to avoid conflict with other traffic. That question was taken from the jury by giving the erroneous instruction omitting the statutory exception for the exigencies of traffic. The instruction given was tantamount to an instruction Tinnon was parked in an illegal place and that the law didn't make any allowance for traffic conditions. That is wrong. It should have been a question of fact for the jury as to whether or not Tinnon violated the statutory provision.

Defendant seeks to interpret the statutory exception for the exigencies of traffic right out of the statute by urging an unreasonably restrictive interpretation of the statute. Again, it should have been a question for the jury as to whether or not Tinnon was avoiding conflict with other traffic when he stopped where he was and hence whether or not the statute was violated. It was clearly prejudicial under the facts of this case to instruct the jury as to part, but not all, of the applicable law, where the omitted portion of the law was directly applicable to the weight of the eyewitness testimony at trial that plaintiff was unable to move forward due to traffic condition.

The argument made by defendant that plaintiffs should have expected the instruction defendant failed to provide because of a comment and opening statement is without merit. Defendant had submitted AMI 1804. The comment made by defendant in opening statement was consistent with a presumption that AMI 1804 would be given and certainly was in no way notice that the instruction complained of had been submitted to the Court by defense counsel unbeknownst to counsel for plaintiffs and intervenors. It never crossed the minds of counsel that defense counsel had done so, nor should counsel have suspected such from such comment. The instruction was not provided to counsel for plaintiffs and intervenors, resulting in counsel for plaintiffs and intervenors believing the instruction complained of was the Court's own instruction when given. It bears reiterating there was no opportunity to review the instruction beforehand.

The argument it would have made the instruction "abstract" to have included the statutory exception is also without merit. There was substantial evidence from which the jury could have concluded Tinnon was unable to move forward due to conflict with traffic. Therefore it would not have been an abstract statement of the law.

In conclusion, plaintiffs and intervenors have clearly been prejudiced by the giving of the instruction in question because the jury was instructed that A.C.A. 27-15-1302 created an unqualified duty upon operators of vehicles to not at any time under any circumstances stop a vehicle within 50 feet of the nearest rail of a railroad *even when necessary to avoid conflict with other traffic*, contrary to the express provisions of the law. It is likely the jury felt the railroad was in violation of one statutory duty by not keeping a proper lookout and that plaintiff Tinnon was in violation of another statutory duty by being within 50 feet of the rail. The jury was not permitted to determine if plaintiff's vehicle was stopped to avoid conflict with other traffic and hence did not violate the law. To remove such question from the jury and, in effect, instruct a statutory violation occurred as a matter of law, rendered the proceedings unfair to the plaintiffs and intervenors since the jury was not correctly charged as to a crucial portion of the law. Plaintiffs and intervenors respectfully state a new trial should be granted to prevent a miscarriage of justice.

Respectfully submitted,

(BY ATTORNEYS FOR PLAINTIFFS
AND INTERVENORS)

(Certificate of Service)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION
(FILED: Apr. 30., 1987)

CARL W. TINNON
and LOLA TINNON PLAINTIFFS

v. NO. J-C-86-39

BURLINGTON NORTHERN
RAILROAD COMPANY DEFENDANT

ANSWER TO AMENDED COMPLAINT

Burlington Northern Railroad Company, for its answer to the amended complaint of plaintiffs, makes the following admissions, denials, and statements of fact:

1. Admits the allegations made in paragraph 1 of the amended complaint.

2. Admits the allegations made in paragraph 2.

3. Admits the allegations made in paragraph 3 and states, with reference to the allegations of jurisdiction in such paragraph, that the defendant is a citizen of the state of Delaware by reason of its incorporation, and it is further a citizen of the state of Texas by reason of having its principal place of business in Forth Worth, Texas.

4. Admits the allegations made in paragraph 4.

5. Pleading to the allegations of paragraph 5, admits that the defendant owns and maintains railroad tracks running generally parallel to U.S. Highway 63B in the southeasterly section of the City of Jonesboro, and admits that State Highway 351, also known as Industrial Drive, crosses the defendant's railroad tracks at such point, but denies that the crossing is abnormally dangerous.

6. Admits that on May 21, 1984 at about 11:45 a.m., Carl W. Tinnon, after driving in a westerly direction over the tracks here involved, stopped the tractor-trailer rig which he was operating in such a manner as to leave the rear of the rig close enough to the edge of the tracks that it obstructed the clear passage of the defendant's train. Admit that while the tractor-trailer rig driven by Carl W. Tinnon was afoul of the tracks, that a train of the defendant approached the crossing, was unable to stop after it was determined that the rear of the truck was partially obstructing clear passage, and a train-truck collision ensued.

7. Denies the allegations of negligence made in paragraph 7 of the amended complaint and denies that the defendant was guilty of any negligence which proximately caused the collision and damages claimed by the plaintiffs.

8. Being without sufficient information as to the allegations of injury and damage made in paragraph 8, the allegations of such paragraph are denied. States that in any event, regardless of expense which has been incurred on behalf of the plaintiffs, the defendant has no legal liability therefor.

9. Denies the allegations made in paragraph 9.

10. Denies each and every other material allegation of the amended complaint.

11. States that the plaintiff, Carl W. Tinnon, was guilty of negligence which was a proximate cause of the accident and the damages which he and his wife claims and his negligence was greater in degree than any negligence of the defendant. Such negligence is pleaded in bar or diminution of the damages claimed by both of the plaintiffs.

12. States that the negligence of Carl W. Tinnon, causing or contributing to cause the accident, included the

following: failure to keep a proper lookout; failure to keep his vehicle under proper control; failure to yield the right of way to the train; failure to heed the whistle and bell warning signals given from the engine of the train upon its approach to the crossing; failure to exercise ordinary care in the operation of the vehicle; failing to be sure that his vehicle had adequately cleared the tracks when he brought his vehicle to a stop and kept it standing in such spot upon the approach of the train; obstructing the clear passage of the train by placing his vehicle in a position where it was afoul of the tracks; and, failure to stop his vehicle as prescribed by Ark. Stat. 75-637 and the rules of the road applicable to the movement of his truck.

WHEREFORE, the defendant, Burlington Northern Railroad Company, prays that the plaintiffs take nothing herein, and that it have its costs and all other proper relief.

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